



# San Francisco Law Library

No. 76674

Presented by

---

## EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.











1124  
No. 3073

---

1124  
**United States Circuit Court  
of Appeals  
for the Ninth Circuit**

---

CHARLES P. DOE, Claimant of the Steamship  
"GEORGE W. ELDER," Her Engines, etc.,  
Appellant,

vs.

COLUMBIA CONTRACT COMPANY, a Corporation, and  
UNITED STATES FIDELITY and GUARANTY COM-  
PANY, Stipulators,  
Appellees.

---

**Brief of Appellant**

---

FILED

JAN 7 - 1918

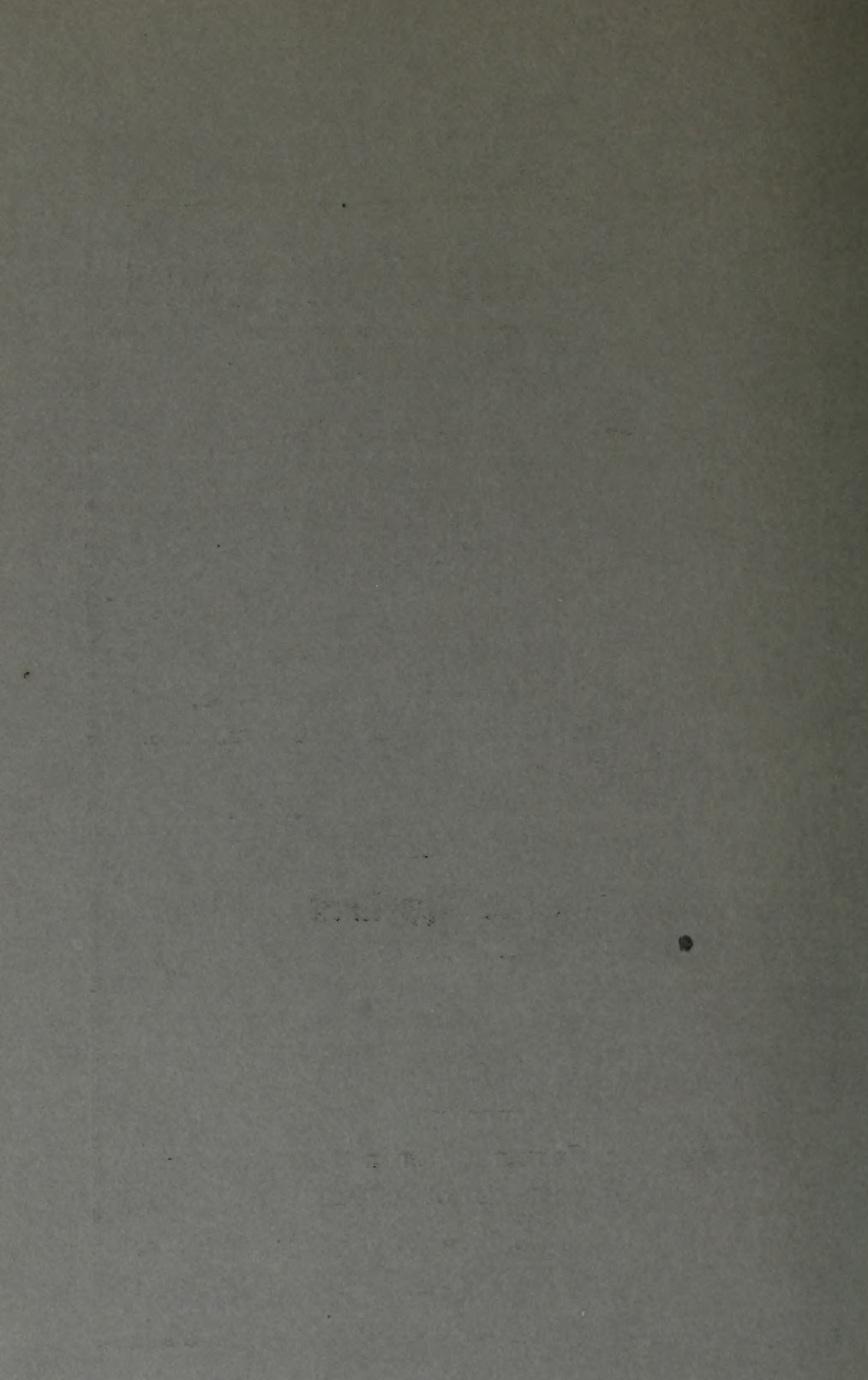
F. D. MONCKTON,  
CLERK

---

H. W. GLENSOR, ERNEST G. CLEWE, SANDERSON REED,  
Proctors for Appellant.

IRA A. CAMPBELL, C. E. S. WOOD and ERSKINE WOOD,  
Proctors for Appellees.







# United States Circuit Court of Appeals for the Ninth Circuit

---

CHARLES P. DOE, Claimant of the Steamship  
"GEORGE W. ELDER," Her Engines, etc.,  
Appellant,

vs.

COLUMBIA CONTRACT COMPANY, a Corporation, and  
UNITED STATES FIDELITY and GUARANTY COM-  
PANY, Stipulators,  
Appellees.

---

## Brief of Appellant

---

### STATEMENT.

This suit was brought by the owners of the Kern against the Elder for damages claimed to have been caused by the Elder in collision with the Kern on the Columbia River on the night of August 18, 1909.

Approximately opposite the Waterford light on the Columbia River the river is in the neighborhood of a mile in width, with plenty of water.

About midnight of August 18, 1909, the Steamer Kern was making fast to a tow in the fairway.

The Kern was 153 feet long (p. 30). The tow consisted of three barges, each 142 to 180 feet long. (p. 30; p. 448) These barges were fast to each other, side by side, the center one projecting its bow some distance beyond the bows of both of the barges on each side.

The barges were adrift. Each carried about 1000 tons of rock for the Columbia River jetty and of the sizes and for that purpose, (p. 125), making about 3000 tons in all.

The barges had been turned adrift by another steamer belonging to libellant in order that the Kern might tow them to the jetty. The Kern was endeavoring to make fast to these barges by inserting its bow against the stern of the center barge, leaving a barge fitting backward on each side of the bow of the Kern. Thus attached, the Kern was to push the barges ahead of her. The Kern was backing and filling at the time. (Test. of Jensen, Asst. Eng. on the Kern, p. 241.) The Kern had a line out to what we understand to be the down-stream barge,—(it is called in the testimony the “port” barge), and was endeavoring to reach a position where she could insert her bow in the space provided by the arrangement of the scows in order to make fast and proceed with her business. There was a slack in the line of some feet, the decree says five or thereabouts. Adding the length of the Kern, 153 feet, the minimum length



of the barge, 142 feet, say 20 feet for the extension of the center barge, gives a total length of 315 feet, covering the space occupied by the Kern and the barges. Taking the testimony of Anderson would add a few feet, say 40 feet more to the barges. The Kern and the barges can then fairly be said to have occupied from 300 to 365 feet total space. There was no lookout on the Kern. All hands were on the main deck and the barges looking forward making fast to the barges except Capt. Moran. There is no evidence to the contrary. She carried a crew as follows: Captain Moran, Pilot; a Master, Captain Copeland; a mate, a chief and an assistant engineer and four sailors (p. 173).

\* \* \* \* \*

The Kern was in charge of Captain Moran. He was in the pilot house of the Kern, when he heard the Elder's first whistle, and there was no lookout. The Kern is not a river boat. She was once the Lighthouse tender Manzanita. The Kern was lying up and down stream previous to the collision, her sidelights invisible to the Elder, but at the time of the collision had put herself more or less crosswise about in line with the direction of the barges.

While she was in this position she came into collision with the Elder on her way from Portland to Astoria.

The Elder was a passenger ship on her regular run from Portland to San Francisco. She had just rounded or passed Cooper's Point on a course

as her pilot testifies (see the Opinion) of half a point to the starboard of the Kern. The Kern's presence in the river below had been discovered at that time and the pilot endeavored to bear off the Washington shore some four hundred feet, which would leave the Kern to the Elder's port three hundred to six hundred feet. (Opinion.)

Making use of the Opinion in the absence of findings of fact, it will be seen that the decree recites certain testimony of witnesses and then sets forth (p. 55):

"It is problematical as to just how near the Elder had approached the Kern when she blew her second whistle. The distances are variously estimated from one thousand to fifteen hundred feet to very near at hand. Arnesen says she was pretty close to them. From either point of view she kept her course until that time, that is, she was running directly with the Kern or with the Kern one-half point upon her bow, in my view, directly for the Kern. The thing which appears to be *practically certain* is that the Elder at this point put her helm hard to *starboard* and reversed her engines to full speed astern."

Nevertheless the court does not find that the Elder necessarily heard the response to her first signal, but says (p. 60):

"But if it be that the Elder did not hear the response to her first signal it was a grave fault to approach so near to the Kern on the course she was running as to jeopardize the situation. She should either have done what she did do in the extreme or have departed from the rules and gone to starboard of the Kern."



The Elder was in charge of Captain Patterson, the pilot. There is nothing in the evidence specifically describing what a pilot is, but the evidence shows that the master of the ship was on board and no doubt the court will take cognizance of the fact that the law requires a pilot between Portland and Astoria, which law has to be complied with by the ships; that such pilot is not an employee of the ship although his fees are paid by the ship, and is under five thousand dollars bond. The pilot in this case was Captain Patterson.

It already has been pointed out that in the absence of findings and in the absence of positive statements in the Opinion of the court below as to the facts it is difficult to set forth facts as established by the decree. The Opinion indicates the doubt of the court below on several points, but nevertheless the court says that the Elder struck the Kern on her starboard quarter at an angle of about 34 degrees; that the Elder sounded her first signal to the Kern when approximately half a mile distant. The Opinion further recites that as to whether the Kern gave response to the first signal of the Elder there is a sharp conflict in the testimony.

It seems to be established, however, that the Elder signalled at approximately a half mile from the Kern. Whether or not this signal was answered is immaterial so far as the appeal of this case is concerned. The fact is, the Elder signalled, whether the first time or the second time, approx-

imately a half a mile from the Kern. Captain Moran discontinued his work on the barges, left the pilot house of the Kern and looking back saw the Elder's lights. He left the pilot house to do this. The Kern was backing and filling in the river. Captain Moran was looking out of the window forward and went to the door and looked astern to see where the whistle came from. He went out the starboard door of the pilot house, then he gave four short blasts of the whistle in answer to the whistle from the Elder. He gave those four short blasts a second or so after the whistle of the Elder. He then went outside to watch the Elder. He went "to the starboard rail on the side of the bridge." The Elder gave a second blast. Captain Moran then gave the danger signal again. After he gave the whistles he "jumped outside again to watch the Elder." He waited awhile, noticed she was swinging her head to port and he rang his vessel full speed ahead with his helm hard aport. The wheel was lashed hard aport all the time. Captain Moran did not put the wheel over to escape the accident. The libellant produced no testimony on this point.

It is further established that the Elder reversed immediately on the second whistle, which would throw her bow to port. The decree further says:

"It is stoutly urged that the Kern was rendered in fault because Moran refused permission to the Elder to pass, under a mistaken interpretation of Rule VIII. Moran watched to ascertain whether the Elder



changed her course after signalling for permission to pass, before he acted, and, observing no change, he refused permission. He candidly concedes that his impression of the meaning of the rule was that it required the Elder to change her helm before the assent should be given. In this he was in error, for the rule requires the contrary, that is, that the overtaking vessel shall change her course upon receiving assent from the overtaken vessel—not before, but after receiving such assent.

The question is a serious one, and not free from difficulty; but I have concluded that the mistake of Moran was not the proximate contributing cause of the collision.”

The court further says:

“I am satisfied that Moran did not refuse his consent to the Elder to pass arbitrarily, or with any wanton purpose of vexing her or impeding navigation. He assumed for his own safety that he ought to withhold his assent because the Elder was heading directly for his boat, upon the mistaken idea that she ought to have changed her course at once after signalling for permission to pass the Kern. The Elder, nevertheless, should have heeded the signal from the Kern, and if she had, and had acted with the same energy that she did on getting the second signal from the Kern, there would have been no collision.”

To make a general statement, and omitting all question at this time as to whether or not the Elder’s first signal was answered or not:—the Elder signalled to pass to starboard as she was headed, received four short blasts, slowed down, signalled again, received four short blasts and reversed at once. She signalled to pass to the

starboard of the Kern where there was plenty of room. In reversing, the bow of the Elder swung to port and caught the Kern sixteen feet forward of the steering post, the Kern at the same time throwing herself crosswise in the fairway, her wheel lashed.

With regard to the exhibits, that is, the so-called charts drawn by counsel and witnesses representing the positions of the respective craft, the situation is made clear by a statement of one of the libelant's proctors on page .. during the discussion regarding the same.

Mr. Wood: "I will say this Mr. Denman, very frankly, all of these testimonies in cases of this kind are approximate. There are none of them mathematically exact."

As to distances, Captain Moran of the Kern says on page ...:

"It was a dark night. It is all approximate."

Discrepancies in the evidence of the witnesses on both sides between what they said before the inspectors and what they said at the trial are found as usual in these cases.

#### ISSUES.

On the 3d day of February, 1913, (p. 28), an interlocutory decree was entered whereby the court held the Elder to be in fault and charging the Elder with all of the damages, the same to be ascertained later before a commissioner.



Thereafter testimony was taken as to the damages and on the 28th day of December, 1916, a decree was rendered against the claimant of the Elder and the surety on his bond. The claimant makes this appeal from such decree.

No findings of fact were filed by the court. An opinion was rendered by the court at the time the interlocutory decree was rendered (p. 49), from which it can be seen that the court decided certain facts. The opinion, however, does not use language of a positive character regarding many of the important facts. It holds as a matter of law that the Elder was to blame, even if the version offered by the Elder's witnesses should have been accepted.

The opinion says (p. 60):

“But if it be that the Elder did not hear the response to her first signal it was a grave fault to approach so near to the Kern on the course she was running as to jeopardize the situation. She should have either done what she did do in the extreme or have departed from the rules and *gone to the starboard* of the Kern. In either event the collision would not have happened. This would be the case whether she knew the Kern was dead in the water or moving. The emergency was one which she ought to have been upon her guard about. She knew the Kern and the Hercules were in the habit of exchanging tows in the river and she met the Hercules almost at the very time that she sounded her first signal to the Kern and should have known that the Kern was engaged in the very thing she was trying to do at the time, namely, to pick up her tow.”

It will be contended that there is no law which requires a pilot to know the habits of a vessel half a mile away in the darkness and that the pilot was bound by the signals under the regulations.

The court further says (p. 61):

“The question is a serious one and not free from difficulty, but I have concluded that the mistake of Moran was not the proximate contributing cause of the collision. I am satisfied that Moran did not refuse his consent to the Elder to pass arbitrarily or with any *wanton purpose* of vexing her or impeding navigation.”

Moran was pilot of the “Kern.”

It seems therefore to the appellant that this case is as completely open for hearing in the appellate court as it was in the lower court and, as there are no questions of fact settled by the court below other than those found from the opinion, the appellate court can hear this case on the law and the admitted facts and is free to make findings on those issues of fact not settled by the court below.

An examination of the opinion shows the difficulty in reporting or representing what the findings of fact by this decree can be said to be.

An examination of the opinion shows that in the first few paragraphs the only fact established by the decree is that Cooper’s Point is approximately five-eighths of a mile above the place of collision and as ships round Cooper’s Point and

pick up Waterford light they bear away from the Washington shore.

The opinion points out what is claimed by the testimony of the officers of the Elder. It then "on the other hand" shows what the officers and deck hands of the Kern say.

From the testimony of the witnesses as recited, the court seems to find that (p. 54) :

"The Elder sounded her first signal to the Kern when approximately half a mile distant, and this I am constrained to believe to be the fact."

The court says it may have been nearer and may have been farther and that no implicit reliance can be placed upon the estimate of the witnesses on board the Kern as to how far distant the Elder was when she blew her first whistle.

Thereafter the opinion described what the witnesses spoke of, that the testimony of witnesses on behalf of the Kern discredits the testimony of the officers of the Elder to the effect that the Elder was running on a course having the Kern a half point upon her port bow, because if she had been the evidence should indicate that the Elder's green or starboard light would have been shut out from the Kern and as the Elder approached the angle would have increased, more perfectly obscuring her green light. The court did not cite the testimony of ..... on page .. that the green light was shut out and says, "it is prob-



lematical as to just how near the Elder had approached the Kern when she blew her second whistle." The court does make a finding (p. 55) :

"From either point of view she kept her course until that time, that is, she was running directly for the Kern or with the Kern one-half point on her bow, in my view, directly for the Kern."

The court then says (p. 55) :

"A thing which appears to be practically certain is that the Elder at this time was putting her helm hard astarboard and reversing her engines to full speed astern, which gave her a curving course to port and yet she collided with the Kern. From the expert testimony it would seem that if she had been a thousand feet distant when she began to execute the maneuver she would probably have cleared the Kern and her tow or stopped before reaching her. If within five hundred feet the results would have been problematical. Possibly even then she would have cleared the Kern."

The opinion then touches upon the conflict in the testimony and finally applies a rule of law to the effect that the witnesses on the Kern are entitled to greater credence in regard to the whistles than the witnesses on the Elder, based on a rule of law cited in the opinion.

The court then finds that the

(p. 55) "Officers of the Elder did hear the response from the Kern and the Elder is chargeable with positive knowledge that it was given."

The opinion then proceeds to apply the rules of navigation, citing the same and the court holds (p. 58) :

“That the duty was imposed on the Elder not to attempt to pass the Kern until such time as it could be *safely* done, at which time the vessel ahead is required to signify her willingness by blowing the proper signal.”

The court held:

(p. 58) “This makes the vessel ahead a judge as to when the overtaking vessel can safely pass.”

The court further held:

(p. 58) “The Elder slowed down but kept her course, this in spite of the fact that she was steering straight for the Kern and approaching her at a rapid rate.”

(p. 59) “Continuing in this way the Elder again asked permission to pass.”

(p. 59) “The Kern again refused and then it proved too late to avoid the collision for it occurred in spite of the energetic efforts of the Kern to prevent it.”

The court then proceeds to argue as to the direction that the Elder was steering after having previously found that the Elder was approaching with the Kern on her port bow or steering straight for the Kern. The opinion proceeds to discuss the question as to how the Elder really was proceeding, and proceeds to say that (p. 59) :

“It is altogether probable the Kern was pressing ahead with her helm apart.”

It will be seen from uncontradicted testimony of libellant that the helm on the Kern had been lashed

hard aport, was so when the Elder first signalled. There was no finding as to who was handling the Kern except when she had to back and fill to make fast to the barges. The court thereupon finds (p. 59) :

“And the curving motion of the Elder would naturally bring her into collision at some angle.”

The court here finds that the Elder came down reversing and therefore curving to port and hit the Kern, and it will be shown that if she did this she must have had the Kern on her port bow at the time the Kern gave the signal that the Elder could not pass to starboard of the Kern.

The court thereupon as a matter of law indicates that the Elder should have been mindful of her rapid approach to the Kern and should have avoided running so near as to put her in peril of a collision, in answer to which the claimant will show that this was in the Columbia River and the Elder had signalled at a proper distance to pass to the starboard and was passing to starboard and the Kern prevented it and refused permission; and further that the Kern was not “running in the same direction.” The court then holds that the Elder was at liberty to break the rules and should have broken the rules in order to avoid danger.

The court further says (pp. 59-60) :

“Furthermore if she had so continued until she gave her second signal the probabilities



are she would by that time have so indicated her course to the Kern and the latter would have signified permission to pass as requested."

The court further says (p. 60):

"Supposedly at this time such would have been the case, counsel for respondent suggests that the response given by the Kern indicated not only that the Kern was in jeopardy but that it was not safe to the Elder to pass on either course to the starboard of the Kern or between her and the Washington shore."

The decision says, referring to Captain Moran on the Kern (p. 61):

"He candidly concedes that his impression of the meaning of the rule was that it required the Elder to change her helm before the assent should be given. In this he was in error for the rules require the contrary, that is, that the overtaking vessel shall change her course upon receiving assent from the overtaken vessel, not before, but after receiving, such assent."

The respondent and appellant will content that this is of the greatest materiality, although the court below concludes that this mistake of Moran's is not a proximate contributing cause of the collision. The respondent and appellant believes that this error of Captain Moran's, together with the absence of the watchman and the fact that no attention was paid to navigation on the Kern at the time the Kern was being made fast to the barges, were the contributing and proximate causes of the collision, based on the fact that the Kern was not "running in the same direction;" or moving at

all in the same direction, and failed to signal that she was backing, if she claims she was moving in the same direction.

The opinion further holds that the burden of showing the fault of the collision lies on the Elder and not on the Kern.

The court below expresses its opinion as a matter of law, that the burden of proof is on the Elder, instead of on the Kern, notwithstanding the Kern's wheel was lashed, that she had no lookout, and the Captain's admission he did know that the Elder was bound to keep her course until he answered her signal, and that she was not "running in same direction."

The court specifically holds that (p. 63):

"The absence, however, of such lookout was void of any causative effect in bringing on the collision."

The appellant and claimant contends that if there had been a lookout or an officer on duty, the danger signal never would have been sounded.

The contention of the appellant is based on negligence of Captain Moran of the Kern who, intent upon handling the drifting rock scows, was using all hands, including himself, to make fast to the scows and was not giving attention to the approach of other vessels, either by a lookout or by means of a pilot or other officer: at the same time, misunderstanding and misapplying Rule VIII., thereby forcing the Elder, which was ready and trying to go to the starboard of the Kern, to

reverse, which threw the Elder's bow to port, bringing about this collision sixteen feet forward of the stern post of the Kern, which was then about cross-wise of the current with its wheel lashed and drifting, and no signal to the Elder that she was not running.

The appellant contends that the fairway is for the use of all ships and although the Kern was within its rights in handling its tow in the fairway, yet this does not relieve the Kern from complying with the law and the fact that it had been customary for the Kern to exchange tows in the river could not create any custom or usage which could obviate the necessity on its part of using ordinary and usual care.

The appellant believes that it can hardly be said that the fault lay with the Elder, which did nothing but comply with the Kern's signals, whether erroneous or otherwise.

The appellant believes that the court below received and acted upon an erroneous impression of this case, resulting in a holding entirely different from what the law contemplates and what the evidence has actually brought forth.

Nor does the appellant understand the proposition of law declared in the opinion, "that it was the bounden duty of the Elder to keep out of the way of the Kern."

The appellant will contend that the Kern was not exempt from the same duty as the Elder, and



that the Elder had as much right to fear for its own safety in the immediate presence of drifting rock barges as the Kern and was compelled to notice the danger signals for its own safety and not risk a collision with a possible drifting barge between the Washington shore and the lights on the Kern,—that is to say, on the course she, the Elder, was going when she received the danger signal, and pursuant to Rule XII.

## POINTS AND AUTHORITIES.

### I.

At the time and before the collision the Kern was violating a statutory rule. There was no lookout.

The burden is upon her of showing that her fault could not have been a contributing cause of the collision.

*The Beaver*, 219 Fed. 134, 138.

7 Cyc. 370.

*The Santa Clara*, 21 Fed. Cas. No. 12, 327.

*The Pennsylvania*, 19 Wall. 125, 136.

*The City of Washington*, 92 U. S. 31.

*The Admiral Schley*, 142 Fed. 64.

*The Ellis*, 152 Fed. 981.

### II

The Kern must show that the absence of her lookout could not have contributed to the disaster.

“Where a vessel has committed a positive breach of a statutory duty, she must show not only that probably her fault did not contrib-

ute to the disaster, but that it could not have done so.”

*The Beaver, supra.*

### III.

The Kern with the barges was not only in the fairway, but volutarily in the ship channel. She was not there by accident or emergency with the drifting tows.

“Vessels which by some accident or emergency are compelled to anchor in the channel outside anchorage limits shall at night display two red lights in the manner prescribed above.”

Rules for Barges and Canal Boats in Tow of Steam Vessels.

### IV.

“When steam-vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam-whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam-whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead

until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel."

Rule VIII. Pilot Rules for Certain Inland Waters.

V.

"Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed."

Rule IX., Art. 21.

The Kern was on no course; her wheel was lashed; she was backing and filling.

VI.

Whereas, under the rules as written, it is argued that the Elder is an overtaking vessel, nevertheless, the Kern, with its tows is in the class described in the rules under the heading, "Warning Signals for Wrecks and Vessels Working on Wrecks or Engaged in Other Submarine Work."

It is a misconception of the rules to say that the Kern is an overtaken vessel. The rules plainly indicate that in order to apply the stringent provisions in the Rules, contained in Article 24, to-wit:

"Notwithstanding anything contained in these rules every vessel overtaking any other shall keep out of the way of the overtaken vessel,"

the conditions for which the rules were made must



The steering and sailing rules apply to vessels navigating on steady courses. A tug maneuvering tows is not an *overtaken* vessel and the rule applying to an *overtaking* vessel has no application. Art. 27 of the Inland Rule applies.

*The John Rugge*, 234 Fed. 862.

There are conditions not covered by the rules.

*The Servia*, 149 U. S. 144, 37 L. Ed. 681.

Another condition where the passing rule is held not to apply is found in

*Transfer No. 19*, 194 Fed. 77-78.

The absence of a lookout on a float while being made fast to a tug is held negligence.

*The Edward G. Murray*, 234 Fed. 61-62.



exist and not half or a portion of the conditions,—in short, the vessel must be overtaken to be an “overtaken” vessel, which the Kern was not. Although not anchored the Kern “was not running in the same direction.” She was either stationary or backing and filling. It is the duty of the court to give due regard to “all” dangers of navigation and collision, those of the Elder as well as of the Kern.

“In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.”

Rule IX, Art. 27.

## VII.

Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.”

Rule IX, Art. 29.

## VIII.

“A vessel *in advance* is not bound to give way or to give facilities to enable a vessel in her rear to pass her, though she is bound to refrain from any maneuvers calculated to embarrass the latter in an attempt to pass.”

*The Governor*, Fed. Cas. No. 5645.

*The Golden Rod*, 194 Fed. 515.



## ARGUMENT.

The record shows that the utmost liberality was allowed by the court below in the introduction of evidence. In fact the record shows a very considerable amount of space taken by questions and answers, either of an experimental character or with no bearing upon the issues, only serving to illustrate the now well-known fact that different people receive different impressions from the same facts and so declare themselves, and the further well-known fact of the divergence of testimony of loyal sailors in cases of collision.

Captain Moran of the Kern says he could not tell the distances. Mr. Wood, one of his proctors, indicates the same.

It is submitted that the cause should have been heard and terminated with a broader view than that covered by the testimony of one man or one set of men or a matter of a few feet.

The Rules and the Admiralty Law call for a consideration of the entire situation by the court;—the river, the fairway, the ships channel, the ships, their needs and requirements, what they were doing, what they should be doing and what they should not do, with reference to each ship and both ships, one as fully as the other.

### I.

#### BURDEN OF PROOF.

It was Captain Moran's business and it is a necessity on the part of the libellant under the law,

the claimant contends, that the Kern should show, not only that her fault in not having a lookout did not contribute to the disaster, but that it could not have done so.

The Kern enters this cause as libelant under the burden of showing, first, that her condition in transgressing the statute and the rule did not cause the accident.

The libelant makes serious claims and serious charges. The claimant and appellant attacks the libelant's claims and position and says "*show you are right and we are wrong,*" and submits to the court that this is the law. The burden of proof is on the libelant as a matter of law. The burden of proof is not on the Elder or the claimant and appellant and never was.

It is submitted that the court below received an erroneous impression with regard to conditions that existed, and the rules.

It is submitted that the Kern, prima facie, and on libelant's own statement and admissions was at fault, first and last, in this collision. Whereas, a ship, with or without tows, has a right to the use of the fairway, there are facts and conditions which make blocking the fairway negligence. The rules indicate this and the admiralty courts recognize it.

That the rock barges were a menace cannot be and has not been contended. The Kern picked the ship channel, or rather the Hercules did, in which

to drop the tow. It should be understood that the captain of the Hercules is an employee of the libellant and his acts bind the libellant. He left the tows in the fairway. On the other hand, the Kern coming up the river left its empties clear of the fairway and safe.

The undersigned, on behalf of the appellant, offers the proposition of law that to leave these rock barges in the ship channel of the fairway on the Columbia River where there was unlimited space without the fairway, is itself gross negligence, and however much this point may be criticized or attacked or the proposition denied, nevertheless, a familiarity with the river makes this contention a positive one.

Let us take an example. Suppose similar work were being done at Marshfield and that by reason of conditions an interchange of tows would have had to be made below the city where a fill has been made, where the channel is narrow and where the Elder would occupy almost all of the channel. Or suppose the location for the change had happened to be at a point in the Columbia River where the channel is narrow, or at a bend in the Willamette, say, for instance, at Swan Island, no riverman and no one engaged in business or water transportation would say that the location of the change in itself was a matter of negligence, inasmuch as the location could not have been changed or helped. But the undoubted orders of the captains of these respective boats was to leave their respective terminae



at such a time that they could make their change at that point in the Columbia where the width of the river made the change of tows possible with safety to navigation. And it can easily be believed that these rules were broken by the captain of the *Hercules* in leaving the rock barges where they were left.

The appellant takes the position, as it has from the beginning of this cause, that the libelant is guilty of negligence in leaving the barges and making the change in the ships' channel where there was unlimited room to make the change without the ships' channel.

## II.

The Kern was to blame for having no lookout. The reason this position is taken is that the law says there must be a lookout and until the necessity for the lookout is disposed of in the mind of the court and to the court's satisfaction, the burden, under the law, lies on the Kern.

And the appellant contends that the evidence cannot relieve the Kern for this breach of statutory duty.

The circumstances upon which the libelant relies to relieve itself of this breach of the law are so suspicious as to justify the court in adopting them as reasons for the breach of the law. Nor do the courts condone a breach of the law in a case like this where the lives of passengers are in danger.

The suspicious circumstances above mentioned are the following, to-wit: the fact that the pilot

on the Kern, in charge of the Kern, did not hear the Elder's signal to the Hercules or the Hercules' signal to the Elder, and did not know the Elder was coming and his wheel was lashed in his pilot house, and he left the pilot house to see the Elder.

It is explained to the court that if the pilot had been on duty in the pilot house he would have seen the Elder. The night was clear. But he says himself that he was busy with the scows. Neither the court nor proctors nor deckhands nor seamen can explain the lashing of the wheel except by the fact that the pilot house was empty. All of the crew and all of the officers of the Kern were engaged in making fast to the barges, excepting those officers not on watch.

Whether the Elder was passing to starboard when she signalled, which seems to be the case, or whether she was headed directly for the Kern, a half mile distant, is immaterial, if a lookout had been on the Kern, provided Captain Moran is honest in his position that he feared an accident because he could not have feared an accident when the Elder was half a mile distant from him when the first signal was sounded, if he had seen her. His only explanation of the fear of an accident could be confusion on his part.

To say that the Elder would not pass to starboard of the Kern as required by the law and as the pilot was doing, in a half a mile's distance is impossible. Why, then, did Captain Moran sound the danger signal? He sounded it on his own facts

and figures, because he had no knowledge of the Elder's position, not being in the pilot house, if he was not, or, if he was, being occupied with the barges, and on receiving the signal from the Elder blew this danger signal when he should not have done so.

Moreover the law, it is submitted, does not support the libellant. Even if the Kern were an overtaken vessel, still she could not embarrass the Elder in an attempt to pass. Whether the Kern was an overtaken vessel or some sort of a derelict or occupying the class described as "a vessel which by some accident or emergency is compelled to anchor in the channel outside anchorage limits at night" is immaterial. She really was not an overtaken vessel under the rules, because she was not running the "same direction" or in any direction, and she was not an anchored vessel and she was not a derelict, and the same applies to the scows. She presents a condition to which the general principles of admiralty will have to be applied.

Under these circumstances she is not allowed to embarrass travel on the river and the word "embarrasss" is particularly well worded in the opinion cited in the Points and Authorities.

The position has been taken by the appellant that Captain Moran, in a sort of a panic sounded the danger signal. His motives, of course, must be shown by the surrounding circumstances and his own opinions as to his motives, it is trusted, will hardly be accepted by the court. If Captain Moran



gave a danger signal when the Elder was a half a mile away or three-quarters of a mile, as he claims he did, he certainly must have thought the Elder was on top of him, and have been mistaken, or else he must have had another reason for stopping the Elder. In the event his anxiety was to make fast to the barges and his difficulty in doing so had so absorbed his attention as to make him take a chance on the river whereby he waited for nothing but blew the danger signal in panic, then we submit the libellant is to blame.

If, on the other hand, Captain Moran knew the Elder was a half or three-quarters of a mile away and knew his barges were not adrift but were fast and knew there was sixty-five feet of water between him and the Washington shore, a matter of 990 feet, and knew the Elder could easily clear him, as he did know, then what is his excuse or alleged motive for stopping the Elder? Why did he then undertake to "embarrass" the Elder in her attempt to pass? The law and particularly the admiralty law cannot fail to be aware of conditions over which it has cognizance. The testimony is clear and strong by the libellant that the wash or swell from ships disarranged the tows and let them loose.

This is a remarkable admission. To think that the Columbia Contract Company would figure so closely as to take a chance on those barges being separated when adrift by the wash from a passing steamboat or steamer and throwing the responsi-

bility of this on the captain of the towboat, would be impossible if it were not testified to and made a prominent feature. The testimony of the libellant, by Captain Moran of the Kern, and others, is that they had endeavored to have the ships and the boats slow down in passing and they never could get it done and that the barges would be washed apart by the swell of a passing steamer unless made fast in time.

It is not hard to draw a mental picture of Captain Moran on the Kern when he saw the lights of the Elder. He was not fast to the barges, he had one line out, the line was not fast, the barges were adrift, the Elder would have been at not a great distance from him in passing and Captain Moran would have had to pick up the barges, if separated or have obtained help from the Hercules for that purpose.

The motive of Captain Moran in signalling to the Elder to stop seems too clear for argument. The only trouble is that Captain Moran forgot that Patterson was in charge of a passenger vessel and that there is such a thing as danger to a passenger vessel being hit by three thousand tons of rock. Captain Patterson reversed to prevent striking a drifting barge, as Patterson undoubtedly thought. The Kern was not running in the same direction and the curve to port brought them in contact.

The case is explained by Captain Pope on page 390:

“If it was broad daylight and I saw my way clear through I should pass ahead, I should go through, I would exercise the right (i. e., he means break the rules), but in the night I should not attempt to go through because it is impossible for us to see very far ahead.”

The appellant contends that the libelant and appellee has come into court subject to certain conditions from which it has not relieved itself; that the libelant cannot obtain a decree against the Elder until it has explained more fully than it has, and with an omission of suspicious circumstances in the testimony, the conditions to justify the breach of a statutory duty and the stopping of a passenger steamer without excuse;—that is, real excuse, excuse based on facts and conditions and not excuse fabricated and presented for purposes of argument.

#### AS TO THE EVIDENCE.

The signals came fast, Moran says, one or two seconds apart. He had to swear the signals came fast, otherwise he would be admitting there was no danger. Granted that the Elder signalled once, the Kern once, the Elder once again, the Kern once again, it will be seen that the entire performance would take about a quarter of a minute, or possibly half a minute. It is established as a fact in this cause that the Elder was about five-eighths of a mile away when she signalled, and we can put it at half a mile; the less, of course, the better for the libelant. However, a half a mile is a good distance,



and it is certainly a sufficient distance. In a half a minute then, the Elder would have gone 528 feet, at twelve miles an hour. This is not knots, this is miles. It is in the evidence that she might go  $13\frac{1}{2}$  miles an hour. At 12 miles an hour she would go a mile in five minutes, a half a mile in two and a half minutes, and one-tenth of a mile in a half a minute. This would be 528 feet, leaving her 2112 feet from the Kern. This can also be figured at fourteen miles if required; it also can be figured at a distance of three-quarters of a mile that she blew her whistle, but under the evidence and the findings of the court, not under a half a mile. She was then some two thousand feet from the Kern when the helm was thrown over and she reversed her engines.

However, it seems to the appellant that these matters of direction, feet, angle of impact and all such items are immaterial. The point to this case is whether the Elder was a half a mile off at least, why did the Kern try to stop her? That seemed to be the thought in Captain Patterson's mind, for he called to the officer on the bridge, "For God's sake what are those fellows trying to do?"

The excuse that Captain Moran gives is that he thought the Elder was headed for the Kern and did not know that the Elder would keep her course until receiving assent of the Kern to go to star-board.

This is his excuse for what he did. He gets out in the river with his tows adrift in the ships' chan-

nel, which is bad enough, then when he sees a boat he says "I will stop that boat because she is half a mile off and I think she looks as if she is going to hit me," notwithstanding the clear water on both sides of the Kern and the assurance from the Elder that the Kern would not be hit, for the Elder assured the Kern of this fact when she signalled that she would pass to the right.

The captain of the Kern has no right to take the law in his hands. There is an atmosphere of impeccability about the libelants' case, an assurance of superiority and proprietorship, which, of course, is based upon a successful business, but the fact that they have sold the Government this rock since 1898 and acquired a fleet of boats and a large business hardly justifies Captain Moran's excuse. He almost boastfully declares his ignorance of the law.

This assurance of Captain Moran in his testimony of his reason or excuse for stopping the Elder, was a real necessity on his part. The libelant must have an excuse for his act. There must be some pivot on which he can turn and to present an ignorance of the law as a defense or excuse for a claim under such breach, is in fact what this libelant is doing. The libelant claims damages caused by its own acts and presents as an excuse for its own acts an ignorance of the law in doing these acts.

If the libelant claims the time covered by the signals exceeded half a minute it must then (1) re-

pudiate Captain Moran's testimony, or (2) admit that he blew his alleged danger signals so that they could be interpreted as a passing signal to port.

Arthur Nissen, the witness mentioned by the Court below as disinterested, being a fisherman not drifting and who was too unemotional to offer aid to the sinking Kern with his gasoline boat, although only a short distance away, and who testified freely as to this one night, says the whistles consumed half a minute (p. 138), or else he says it was half a minute between each signal. If so, how would Captain Moran explain? Captain Moran says that he took a look and signalled without delay. There is no appreciable time consumed in making one or two steps to a door and then seeing the lights and jumping to sound the danger signal.

But if Nissen means that it was half a minute between signals, then there was no danger signal at all, only a confused sounding of signals by the Kern to pass to port—unless Captain Moran waited with danger signal, which he certainly cannot and does not admit.

Captain Moran says he sounded the danger signal a "second or so" after the Elder whistled (p. 84). He stood a few seconds until the Elder signalled the second time (p. 85). Then he gave the danger signal the second time—he jumped as quick as he could (p. 86). All of this could not have taken over half a minute, probably not a quarter of a minute. In short, Captain Moran, not knowing the



law, not knowing the rules of navigation, compelled the Elder to reverse when the Elder had a thousand feet clear in which to pass the Kern to starboard and four thousand feet to port.

The Kern was exactly in what we call on the Columbia River "the channel." She was exactly in the route taken by seagoing ships.

Captain Moran may have been in the pilot house as he says, or he may not have been. The fact that the wheel was lashed indicates rather his absence, looking after the deckhands making fast to the barges. *If Captain Moran was in the pilot house, why was the wheel lashed?* Moreover, the excuse or explanation of Captain Moran for going ahead is somewhat curious. How could he possibly hope to move three thousand tons on three barges instantly? The Kern had one slack line fast to one of the barges. The Kern was lying up and down with the river. There was a current because Moran says that when the Kern sank it went downstream.

Another claim is the one made by Captain Moran that he had to leave the pilot house to see. This is beyond belief. There is no pilot house from which the pilot or captain or mate or any one else has to go in order to see. Nor is this the case on the Kern. If so, it is negligence in navigation.

Captain Moran did not have to leave the pilot house. All this jumping about and excitement on his part at hearing a passing signal from a ship half a mile away is unbelievable. No officer of a ship leaves the wheel to jump about for a view on

a clear night. It was dark but clear on that night. They all agree on it. The Kern was either being navigated or she was not being navigated. If she was not being navigated, then her navigation had been abandoned for the time being, and the law violated by the fact that she was not in charge of an officer.

Captain Moran gives no explanation for leaving the wheel. We say leaving it, for what other conclusion is there? When the wheel is lashed there is no wheel. If he had to leave the pilot house to see the Elder then she was very far away indeed.

It will never be known what was the situation with regard to Captain Moran on that night. Captain Patterson, pilot on the Elder, says Captain Moran first sounded the signal to pass to his, the Kern's port. He may have done that and he may have sounded the danger signal later. If Captain Moran was busy, as he says he was, making fast to the barges, so busy he could not see the Elder until she signalled, he may have sounded the wrong signal the first time.

There is no captain in a pilot house navigating in the Columbia River who is so incapable as not to see the lights on a ship approaching on a clear night a mile away—to say nothing of half a mile. That is their business.

The libelant proved an unobstructed view from the Kern up-stream.

Nothing could keep the Elder from swinging to port once she began to reverse. She had a left-hand wheel. She struck the Kern on that curve. And there is nothing remarkable about it. The court below states that Captain Moran did not act as he did wantonly or maliciously or with intention of impeding navigation. But the fact remains that damages were caused, which he wishes to fasten on the Elder.

This statement, in the Opinion, carried the suggestion that Captain Moran was to blame,—but not wantonly or maliciously.

And acting as Captain Moran did, we repeat there is nothing remarkable in the Elder colliding either with the Kern or with the barges. She could not help it. The “Kern” and the barges took up a matter of three hundred feet of the fairway, depending on how they were lying.

When Captain Patterson reversed, the Elder’s headway was reduced and she curved to the left. She could not help it. Neither could Captain Patterson. And the arc of the circle she was describing crossed the line covered by the Kern and the barges. Hence, the accident.

It was an accident. The collision was an accident brought about by the Columbia Contract Company and Captain Moran.

There is only one ship channel. The Hercules picked it out for Captain Moran’s work and his perturbed state of mind when he saw the Elder a half to three-quarters of a mile away is evidence

that he was taking a chance and wanted no one to pass him until he had made fast.

And he wanted the Elder to stop so that the swell from her passing would not trouble him. He was not “wanton” as the court said and he was not trying to vex Captain Patterson, but he did not want his barges to drift and he did not want the swell from the Elder until he was fast to the barges. (Test. Kern, p. 437.)

Mr. Kern, one of the Columbia Contract Company’s owners, so indicates. He says they often asked the boats to slow down so the Columbia Contract Co. could have the Columbia River for its uninterrupted use and seems surprised that this was not done. But Captain Moran tried to stop her, and at the same time he broke the law to do so and caused a major accident.

These conclusions appear from the testimony, —they can be seen. Captain Moran knew it was the Elder as well as Captain Patterson knew he had passed the Hercules and that the Kern was then going down with the loaded barges, which she was not.

The Columbia River is not so large that the boats thereon are not known. Captain Moran must even have recognized the Elder’s whistle. He knew she was due there. He knew her schedule. He heard her whistle to the Hercules if he heard anything. He heard the Hercules whistle to the Elder. He could not have helped hearing them if he had been on duty. The Hercules blew a whistle



to pass the Elder. Nissen says so (p. 140). He says it was fifteen to twenty-five minutes before the "Elder" blew to the "Kern," which is of course mere guesswork for the Hercules left the empty barges only a short way off. This is shown by the evidence of George Hale, mate on the Hercules (pp. 232-233). He heard the Elder and the Kern. Now, why did not Captain Moran hear the Elder and the Hercules? He did if he was acting as pilot. He did not if he was acting as deckhand making fast to the barges.

If he heard the Elder signal to the Hercules he failed to state the truth in his testimony.

If he did not hear her, nothing in his testimony is worthy of belief.

He himself admits that he was "interested in the barges" (p. 113). He admits the Elder was taking her usual course (p. 114), and consequently he was blocking the fairway. Moran says the Elder was swinging to port (p. 129). He himself says the Elder was a thousand or two thousand feet distant. The court finds half a mile distant. Moran says the Elder followed the rules (p. 124), and on backing that the Elder would swing to port (until she stopped).

Captain Copeland, master of the Kern, says the Kern's engines worked for a minute before the collision. If so, then the Elder was over one thousand feet away when she began to reverse (p. 159).

Everyone agrees that the Elder was about to pass to the starboard of the Kern—between her and the Washington shore—a clear space with plenty of water for 800 to 1000 feet wide. The Elder could have gone anywhere in that space, as she intended with perfect safety. Copeland says 600 to 800 feet wide, and the Elder could go to forty feet of the bank with sixty-five feet of water (pp. 159-160).

Why, therefore, did Captain Moran want the Elder not to do this?

She was actually going that way. Moran proves it (p. 201). He says the Elder's port light was blinded before she struck, showing how much she had swung to port. And Copeland says the Kern was up and down with the stream when struck. The cut in the Kern shows how she was hit, from the quarter. Moran and Copeland first say the Kern's whistle was immediately after the Elder's.

See pages 202 and 204 as follows:

Q. Now, as I understood you yesterday, you said the reason why you blew the four blasts was because you could not see him (185) moving over to your starboard at the time he asked for permission to go over there with the one-whistle signal; that is correct, is it not?

A. That is correct; yes, sir.

Q. And he had abundant time to have gone over there when he was a thousand feet away without striking you had he not?

A. He had if he had a mind to do it, yes.

Q. And your theory of the case is that before he got any response from you he should have put his helm over to port and started to make that maneuver?

A. That is what I understand the law, to accompany the whistle by the alteration of your helm so as the other man can know what you are doing.

Q. And he must make that alteration of the helm before you have answered, giving him permission to come on?

A. He is supposed to accompany his whistle by the alteration of his helm.

Q. That is, before you give him a reply?

A. That is the way I understand the law.

Mr. Fulton: That understanding of the law is what you based your action on in giving the danger whistle because he didn't port his helm before you answered?

A. Yes, sir; I guess so. That is right, Senator.

Q. Now, do you recollect giving this testimony: "You must allow, 'Senator,' when he blowed his one blast I waited to see if he altered his course a second or two and then gave him four blasts when I seen that he didn't deviate a particle degree, as I could see." You recollect that testimony, don't you?

A. Yes, sir. (186)

Q. Before the United States Inspectors?

A. Yes, sir.

Mr. Campbell: What is the page?

Mr. Denman: Pardon me. That is on page 37; and what I have got next is also.

Q. And also your statement, "Then if you did wait, whatever time you waited you waited for a purpose of ascertaining whether or not he was going to change his course, didn't you? Yes."

The Witness: Yes.

Q. Then you expected him to change his course before you signified that in your judgment it was safe for him to do so, did you?

A. That was what I thought.

Q. You recollect making this statement, on page 51, "Then if you had answered his one whistle and remained where you were at, there is no question but what he would have gone by? A. Providing he had changed his course. Q. That was up to him, wasn't it? A. Yes, sir."

A. Yes.

Q. You recollect making that statement?

A. I do.

Mr. Denman: That is all, Mr. Campbell.

Captain Moran here admits the facts. He must have wanted Captain Patterson to keep his course and slow down and to make him do it he gave the danger signal. And at that the Elder was headed to pass clear to the Kern's starboard, for she had to swing to port to hit the Kern.

Captain Church, one of the libelant's witnesses and employee of the Columbia Contract Company, and Captain of the Hercules, says the Elder was three-quarters of a mile from the Kern when she first signalled (p. 218). That would be three thousand nine hundred and sixty feet. Copeland is a



good witness for the claimant and appellant. He particularly points out the danger of "lying helpless" (p. 223). He shows the danger. He shows that both he and Moran knew they were wrong in lying helpless in the fairway and blocking it, and that fear for his barges breaking loose caused Moran to signal as he did. Copeland says he himself would have let the Elder pass, certainly (p. 227). He also says there was no danger of a collision (p. 229) when the Elder sounded her whistle half a mile away.

The Kern was headed directly down stream at the time, according to Arnesen, one of her sailors (pp. 264-270). He says also it was two or three minutes from the whistle until she struck—which means he was merely answering the question in order not to refuse, because the period of a minute at such a point is an important matter.

He knows the Elder was abreast of Cooper's Point and the Kern was opposite Waterford light, which is five-eighths of a mile. But Arnesen really saw nothing, because he was taking in the slack by hand on the line to the barge. It was after the second signal he looked. Was the Elder then abreast of Cooper's Point?

Crowe, one of libelant's main witnesses, says there would have been no difficulty for the Elder to pass to starboard in half a mile. To a person living on the Willamette River and seeing ships maneuver, even between the bridges, and in a current, it is interesting to learn from Captain

Crow that the Elder might miss the Kern if she wanted to at a half a mile start. However, he does admit there would be no difficulty at all in half a mile (p. 286).

But Captain Patterson on the Elder is a state licensed river pilot of twenty-seven years' experience (p. 312) and has piloted the Elder for twenty years. She makes eleven or twelve knots at maximum, and is quick to answer her helm. He figured, not seeing the lights on the Kern, that she was pushing her tows downstream (p. 317). He figured he was handling an "overtaking" vessel. She was on his port bow. His testimony on page 319 is clear, and also it is reasonable.

The court below allowed the question as to whether or not Patterson was held at fault by the Inspectors for the collision. The court allowed the question, though it seems clearly improper on the ground stated in the objection (p. 324). And the court below was apparently largely affected by this fact. It is, however, not a just procedure for additional reasons. A pilot may be punished by the inspectors, but the one is against the pilot and this proceeding is against other parties entirely.

It is not usually considered that a finding of the inspectors can affect the credibility of the witness, as the court below says it does, on p. 324.

*The court below, however, lets the finding in on the ground that it shows Captain Patterson was convicted of a crime.*

The court's position supported by libelant's counsel (p. 325) is that Captain Patterson is unworthy of belief because the inspectors disciplined him.

The court says (p. 326) that he believes it affects the credibility of the witness. The court says that is as far as it could go, viz., to affect the credibility of the witness. The decree shows that this erroneous contention of the libelant affected the court's decision.

To show the unfairness of the Patterson examination, Patterson is asked about passing Cooper's Point (p. 333). He takes a certain stand. Then he is asked if Capt. Crow stood at the mast of the wreck, could he not see a certain point up the river, and Capt. Patterson adheres to the facts which he knows from a quarter of a century's work on the river. The question was not competent. First, it should be shown that the Kern sank where she was hit and secondly that the point where she was raised was the point where she sank, when Capt. Crow did his maneuvering. In fact, the evidence shows the Kern drifted after the collision and they raised her and dropped her during the wrecking experiments, to say nothing of the fact that the current could move her and that the floats she hung by moved. But Captain Patterson explains that himself (p. 336).

Objection was made by the claimant as to the materiality of the testimony and again the court holds (p. 337) that it affects the credibility of the

witness. How the witnesses' clear and positive statement of a fact under the fire of a cross-examination can affect his credibility is not explained. But the fact remains that the credibility of a witness is attacked, *as a matter of law*.

Captain Patterson is not a witness who avoids. Captain Pattersons' testimony not only is clear but shows a particular and complete knowledge of the situation, and, what is more important, here, of the rules and regulations and the law that requires him to do certain things and refrain from doing others, of which Captain Moran freely and almost boastfully admits he knew nothing.

And after several pages of question and answer Captain Pope says (p. 389) that the Elder would have gone two or three hundred feet to port under headway with her engines reversed in a 1000 feet (p. 398); thus showing the Elder had the Kern on her port bow when she signalled, and was not headed for the Kern as Captain Moran figured.

Captain Whiteman, third mate on the Elder, testified. He was on the bridge at the time. He says the Elder was going inside of the Kern, that is, between her and the Washington shore or to her starboard (p. 401).

Claud Smith, asleep at the time, waked up, but there is no telling when he waked up with regard to the time she began reversing (p. 435).

*If the Kern had been an overtaken vessel, there would have been no collision.*



Patterson should not be charged with knowledge that the Kern was not moving, viz., *was not pursuing the same direction*. All he could see were lights. Consequently Patterson cannot be charged with negligence. He had a right to figure that the Elder was really an "overtaking" vessel and that the Kern was an "overtaken" vessel. Why did not the Kern signal three whistles that she was reversing? She had been backing. The Elder had the right to believe she was overtaking the Kern. If so, the Kern would have been out of the Elder's way long before the Elder could reach her. If the Kern had been "*running in the same direction*" the Elder could not have reached her; the Elder would have been a quarter of a mile behind her at the time and place of the collision.

Respectfully submitted,

SANDERSON REED,  
Proctor for Appellant.

Portland, Oregon,  
December 30, 1917.

No. 3073

IN THE

# United States Circuit Court of Appeals ~

For the Ninth Circuit

---

CHARLES P. DOE, claimant of the steamship  
"George W. Elder", her engines, etc.,  
*Appellant,*

vs.

COLUMBIA CONTRACT COMPANY (a corporation),  
and UNITED STATES FIDELITY AND GUARANTY  
COMPANY, stipulators,  
*Appellees.*

## BRIEF FOR APPELLEE, COLUMBIA CONTRACT COMPANY

---

EDWARD J. McCUTCHEM, F. D. MONTAGUE,  
IRA A. CAMPBELL, CLERK.  
WOOD, MONTAGUE, HUNT & COOKINGHAM,  
McCUTCHEM, OLNEY & WILLARD,  
*Proctors for Appellee,*  
*Columbia Contract Company.*



No. 3073

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES P. DOE, claimant of the steamship

“George W. Elder”, her engines, etc.,

*Appellant,*

vs.

COLUMBIA CONTRACT COMPANY (a corporation),

and UNITED STATES FIDELITY AND GUARANTY

COMPANY, stipulators,

*Appellees.*

## BRIEF FOR APPELLEE, COLUMBIA CONTRACT COMPANY

### I.

#### Statement of the Case.

Upon a dark but clear night, while the Steamer “Daniel Kern”, belonging to appellee, was in the act of making fast to three loaded barges approximately five-eighths of a mile below Cooper’s Point and about one thousand feet off the Washington shore on the Columbia River side, she was run into and sunk shortly after midnight on August 7, 1909, by appellant’s steamship “George W. Elder”.



The "Kern" had previously dropped her tow of three empty rock barges at about Cooper's Point and had returned down the river to pick up the loaded barges which had been brought down from the quarry by the river steamer "Hercules". When in towing position, the steamer carried one barge directly ahead and one on each bow, overlapping the head barge. The loaded barges, after being released by the "Hercules", had, in the few moments that had elapsed, swung around so that they were heading toward the Oregon shore, rather than downstream. While the barges were in this position, the "Kern", heading practically down the river, had come to a stop across and a short distance off the stern of the barges, and had just gotten a line out from her port bow to the port quarter of the starboard barge, intending to back on the same and thereby swing the barges into position across the "Kern's" bows. As the mate of the "Kern" was getting this line out, the "Elder", coming down stream astern of the "Kern" and headed so as to show her masthead and running lights to the "Kern", blew a one-whistle passing signal. To this the pilot of the "Kern", fearing a collision because of the course of the "Elder", replied with the danger signal. The "Elder" then repeated her passing signal, and again the "Kern" answered with four short blasts, and almost immediately thereafter the "Elder" struck the "Kern" on her starboard quarter at an angle of about 34° abaft her beam.

## II.

## THE ARGUMENT.

The assignment of errors does not present any question for the consideration of this court.

Rule 11 of the rules of this court provides that the assignment of errors "shall set out separately and particularly each error asserted and intended to be urged", and that errors not assigned according to the rule will be disregarded.

In the purported assignment (Ap. 641) the particulars of the errors alleged to have been committed are not set out; the conclusions there set forth are only expressions of the opinion of counsel, and do not direct the court to any fact or question of law involved. In fact, they are not exceptions or assignments of error at all. For example, not one of the four purported errors assigned charges a fault upon the part of appellee's vessel. Not one of the four purported errors assigned charges an error in any respect with reference to the lower court's views with respect to the faults committed by appellant's vessel. Not one of the four purported errors assigned charges error upon the part of the court below with respect to any of its conclusions upon the facts involved or the law claimed by appellant to have been violated. The first one merely states that the lower court erred in finding that appellant's vessel was at fault. The fourth merely states that the lower court erred in entering a decree in any sum against appellant. While the second and third state that the lower court erred in assigning the damages due appellee in any sum in excess of \$25,000 and

the third is somewhat to the same point, the brief of appellant is wholly silent upon the question of damages. Assignments one and four, therefore, are the only ones to which we need address ourselves. Consideration of them, however, is unnecessary because they cannot even be said to be too general. They are not assignments of error at all. Granting, however, that they can be said to be assignments, it is obvious that their general character relieves this court of any necessity to consider them or any question discussed in appellant's brief.

In

*The Natchez*, 78 Fed. 183,

the court said:

“The second assignment is that the court erred in allowing certain claims in the libel which evidence adduced by libelant did not substantiate. The general character of this assignment relieves us of any necessity to consider it.”

See, also,

*The Wyandotte*, 145 Fed. 321;

*The Stadacona*, 242 Fed. 624.

**The decree of the trial court should be affirmed upon a well-settled rule.**

In collision cases the difficulty of discovering the truth grows out of the character of the evidence which is always more or less conflicting. Consequently the court that has the opportunity to see the witnesses, hear their statements, observe their demeanor and compare their degree of intelligence is better able than an appellate tribunal to reconcile differences in testimony, or, if that be not possible, to ascertain the real

nature of the controversy. The present case, as even a cursory reading of the record will show, is one in which the lower court had occasion to apply all of the functions of a trial judge. He had every advantage in determining the questions presented. The trial of the cause occupied three days. Every witness called was present and testified in open court. The cause was carefully tried, orally argued and briefed upon its submission and the opinion of the court below (Ap. 29), reported in 203 Fed. 523, evidences conclusively that every question of fact and law in the case was duly weighed and conflicting evidence considered by the trial judge.

We submit, therefore, that the case is a proper one for the application by this court of the well-settled and universal rule that in an admiralty cause the decree of the lower court will not be reversed unless manifestly contrary to the evidence. The rule has been followed by an unbroken line of authority in this and other circuits.

*The Alijandro*, 56 Fed. 621 (9th Ct.);

*Alaska Packers' Assn. v. Dominicio*, 117 Fed. 99 (9th Ct.);

*Pauhanu Sugar Plantation Co. v. Palapala*, 127 Fed. 920 (9th Ct.);

*Peterson et al. v. Larsen*, 177 Fed. 617 (9th Ct.);

*The Bailey Gatzert*, 179 Fed. 44 (9th Ct.);

*The Dolbadarn Castle*, 222 Fed. 838 (9th Ct.);

*The Hardy*, 229 Fed. 985 (9th Ct.);

*City of Cleveland v. Chisholm et al.*, 90 Fed. 431;

*Erie & M. Ry. & Nav. Co. v. Dunseith et al.*, 239 Fed. 814.



In the present case the findings and conclusions of the learned trial court cannot be said to be manifestly against the evidence on the questions of fact involved, but, on the contrary, the overwhelming weight of the evidence supports the decree from which the present appeal is taken.

---

### III.

#### THE "ELDER" WAS AN OVERTAKING VESSEL.

The relative positions of the "Kern" and "Elder" prior to the collision clearly show that they were those of overtaken and overtaking vessels with all the privileges and incidents thereto.

The case, therefore, is the simple one, and the trial court has found the fact to be, of a vessel running down another directly ahead after the overtaken vessel has twice given the danger signal in answer to the overtaking vessel's request for permission to pass her.

Preliminary to the rules of navigation embodied in the Act of June 7, 1897, a vessel is defined as under way within the meaning of the rules when she is not at anchor or made fast to the shore or aground, and, in Article 24 of the Inland Rules governing the navigation of vessels on the Columbia River, an overtaking vessel is defined as follows:

"Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such a position, with reference to

the vessel which she is overtaking that at night she would be unable to see either of that vessel's side lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules \* \* \*."

Appellant in the lower court conceded that the "Elder" was an overtaking vessel.\* His proctors there said:

"The case at bar is manifestly one of overtaking and overtaken vessels."

It was the "Elder's" duty to keep clear of the "Kern".

Being the overtaking vessel, it was the "Elder's" duty to keep clear of the "Kern". Article 24 so provides.

"Notwithstanding anything contained in these rules, every vessel, overtaking any other, *shall keep out of the way of the overtaken vessel.*

"Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such a position, with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's sidelights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, *or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.*"

\* In Art. 3 of appellant's answer it is expressly admitted that "the 'Daniel Kern' was a vessel under way in the waters of the Columbia River" (Ap. 13). The comments appearing on pages 20 and 21 of appellant's brief are not sound, but in view of the admissions made in the lower court and in the pleadings they do not require consideration.

In Rule VI of the Inspectors' Rules and Rule VIII, Article 18, of the Act of Congress are embodied the practical rules of navigation which govern steam vessels in this situation:

“When steam vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam whistle, as a signal of such desire, and if the vessel ahead answers with one blast she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel.”

The rules thus prescribed, imposing upon the overtaking vessel the duty of keeping clear of the privileged vessel, have found such uniform support in the admiralty courts that reference to but few decisions is necessary to show the trend of the law.

In

*The Governor*, F. C. 5645,

District Judge Betts said:

“But the fact that they were running in the same direction, the one astern of the other, imposed

upon the rear boat an obligation to precaution and care not chargeable to the same extent upon the other. In the light of this principle, the circumstances of the present case manifestly cast the burden of proof upon the 'Governor'."

The court applied the rule in

*The Charles R. Spencer*, 178 Fed. 862, 872,

saying, after referring to several authorities:

"From these authorities it will be seen that it was not only the duty of the overtaking vessel to keep out of the way of the one leading her, \* \* \*"

In Vol. 26 of *The Laws of England*, at page 463, Lord Halsbury says:

"While the overtaken vessel keeps her course, the obligation of the overtaking vessel to keep out of her way is absolute."

*The Ruth*, 178 Fed. 749;

*The Sif*, 181 Fed. 415.

With such duty of keeping clear resting upon the "Elder" when she came into the collision, there necessarily followed, as the result of such collision, if she was to exempt herself from liability, the burden of proving two facts hereinafter mentioned.

**The burden of proof resting on the "Elder".**

Upon the "Elder" rested the burden of proving (a) that she was free from fault and (b) that the "Kern" was guilty of negligence contributing to the collision.



Judge Betts recognized this dual obligation on the part of the overtaking vessel, saying in *The Governor*, supra:

“But it devolves upon the ‘Governor’ to show the prudence of her own conduct, as well as to prove negligence or misconduct on the part of the ‘Worcester’.”

And in

*The Charles R. Spencer*, supra,

the court made a similar observation as to the burden resting on the “Spencer”:

“From these authorities it will be seen that it is not only the duty of the overtaking vessel to keep out of the way of the one leading her, but, if collision occur, the burden is cast upon her to show that it occurred without her fault or negligence or bad navigation, but by the negligence of the leading craft.”

To the same effect was the holding of the court in

*The Sif*, supra:

“The *Sif* was the overtaking vessel, and, as such, had the burden placed upon her by the laws and usages of navigation of safely passing the slower ship, and *as such overtaking vessel the burden was upon her to show that the collision was occasioned by no fault on her part, but by some fault or neglect of the duty on the part of the Murcia.*”

\* \* \*

“As it was the duty of the *Sif* to select a place and to keep at a safe distance in attempting to pass and as she was the overtaking ship, it was her duty, *in order to exonerate herself, to show that the fault was that of the Murcia.*” \* \* \*

“We find there is no fault on the part of the *Murcia*, and, as she was the overtaken vessel, the

responsibility for the damage must rest upon the Sif, unless she satisfactorily explains the cause of the collision and *exonerates herself*."

Judge Bean, in commenting upon the obligation of the overtaking vessel in

*The Greystoke Castle*, 199 Fed. 521,  
said:

"She was therefore the overtaking vessel and obligated to keep out of the way. Article 24, Inland Rules. The burden of proof is upon her to show that the collision was caused by no fault on her part, but by some fault or neglect of duty on the part of the tug."

The question of first concern to a determination of the question of liability, therefore, is that of alleged negligence on the part of those in charge of the navigation of the "Kern", for, if she were free from fault, liability rests upon the "Elder", as the collision manifestly was not the result of inevitable accident.

#### **Was the "Kern" at fault?**

In the answer filed by appellant (Ap. 12), negligence on the part of the "Kern" contributing to the collision was alleged in several particulars, some of which, on the trial, were left entirely without evidentiary support. Appellant charged:

(1) That the "Elder" plainly saw the "Kern's" green light when from one-half to three-quarters of a mile away, and that no answer was made to the one-whistle passing signal;

(2) That with the "Kern's" green light still visible, the "Elder" gave a second starboard passing whistle, which was answered by a cross whistle;

(3) That the "Kern's" searchlight was frequently thrown in the faces of those navigating the "Elder", from the time she first saw the "Kern" until the time of the collision, interfering with the direction and control of the "Elder";

(4) That no proper lookout was maintained; and

(5) That the barges were wrongfully exchanged on the river.

#### **The "Kern's" green light.**

The question of the visibility of the "Kern's" green light is of importance, in view of the failure of proof on the trial, only in that it shows how desperately appellant has reached out for a possible contributory fault on the part of the "Kern". In Articles 3 and 4 of his answer (Ap. 16-18), appellant alleges that from the time the "Elder" sighted the "Kern" the latter's green light was visible to those in charge of the navigation of the "Elder", and specifically denies that the "Kern" was then or there, or at any time after the "Elder" sighted her, in such position that the "Kern's" starboard side lights could not be, or were not, visible, or that she was headed down stream, and avers that the "Kern" and all of her rock barges were headed toward the Washington shore and obliquely across the channel of the Columbia. The answer was verified personally by the appellant before one of his proctors as a notary, on the 30th day of

November, 1909, more than two weeks after the collision, and after a hearing had been held before the U. S. Steamboat Inspectors. It is not to be presumed that the allegations of the answer were drawn without consultation by appellant with Captain Patterson, pilot of the "Elder", for such conference would be the most reasonable course for appellant and his proctor to pursue in their preparation for defense, so we may reasonably conclude that the foregoing denials and averments as to the visibility of the "Kern's" green light were based upon information furnished appellant by the pilot Patterson.

And yet, when Captain Patterson was called as a witness on the trial, and questioned as to the causes of the collision, not a word passed his lips in support of the allegations of the answer to which we have referred.

If it were a fact that the "Kern's" green light was visible to the "Elder" from the time she saw the "Kern" to the moment of collision, then the "Elder" did not occupy the position of an overtaking vessel, with all the obligations incident thereto, but was a crossing vessel, with the right of way, for she would then have been on the "Kern's" starboard side.

#### Art. 19 of the Inland Rules.

It follows, therefore, that if the defense embodied in the averments as to the visibility of the "Kern's" green light could have been sustained by the evidence, the burden of proof would have been shifted from the "Elder" to the "Kern".



Can it be doubted that proctors would have taken advantage of the fact had it existed? The voluminous denials and averments of the answer, and the thoroughness with which proctors tried their case, hardly bespeak an indisposition on their part to offer proof which would have relieved them of the burden they carry as proctors for an overtaking vessel.

Their failure to question Captain Patterson relative to the alleged visibility of the "Kern's" green light is not to be explained away upon the ground of immateriality. But a sufficient reason for proctors passing it in silence is found in the fact that on the subsequent raising of the "Kern", the physical damage which she had suffered *demonstrated*, and the lower court so found the fact to be, that the "Elder's" prow had penetrated the "Kern's" starboard quarter at an angle of approximately 34° abaft her beam. To have seen the "Kern's" green light, the "Elder" must have approached the "Kern" at an angle of not more than two points abaft her beam, so that at the moment of collision, to say nothing of the time when the "Elder" was farther up stream astern of the "Kern", it was physically impossible for those on the "Elder" to have seen the starboard light. But even this angle of collision was less than that of the course of the "Elder" approaching the "Kern", for at the time the "Elder" struck the "Kern", the latter was swinging her bow to starboard and her stern to port, by going ahead on a hard a'port helm, thereby tending to swing the arc of the green light's rays more towards the direction from whence the "Elder" came, and lessened the

angle abaft the "Kern's" beam at which the "Elder" was approaching. Add to this physical evidence of the absolute invisibility of the "Kern's starboard light, the testimony of all her officers and crew that she was heading downstream across the sterns of the rock barges, which were canted toward the Oregon shore, and complete refutation is had of the averments of the answer to which we have been referring. In view of these facts, it is not strange that the allegations of the answer were abandoned as a defense, and that proctor, upon the argument, in the lower court admitted that the green light could not be seen.\*

The discrepancy between appellant's pleadings and proof is of importance, however, not merely because of failure to sustain the alleged defense, but because it necessarily goes to the credibility of appellant's principal witness.

#### **The "Kern's" searchlight.**

The condition of pleading and proof as to the use of the "Kern's" searchlight is similar to that of the averred visibility of the "Kern's" green light only more significant. It is charged in the answer (Ap. 22) that "when the 'Elder' first came in sight of the steamship 'Daniel Kern', the said 'Kern' was displaying and operating a powerful searchlight, and, carelessly and negligently, wrongfully and unlawfully, was flashing and directing the same much of the time up the river

\*He there said:

"Mr. Denman: There is no question between us on this point; that is, that the 'Kern' was pointing downstream in such a position that we couldn't see either of her side lights, and that would indicate she was pointing the other way from us downstream."

and frequently into and upon the 'Elder' and into her pilot and wheel-house, and in such a manner as to embarrass and interfere with those in charge of the 'Elder' in directing and controlling her, and so continued to do up to the time of the collision''.

If this were true, could there be any question as to its condemning the "Kern"? If the navigation of the "Elder" was thus interfered with, as it must have been if the searchlight of the "Kern" was turned upon her so as to blind the pilot and the quartermaster, is it reasonable to believe that proctors for appellant would have overlooked its certain effect upon the question of the "Kern's" contributory fault? The very fact that proctors pleaded it as a defense shows the significance which they attached to it. Furthermore, Rule VIII, Section 12, of the General Rules and Regulations prescribed by the Board of Supervising Inspectors expressly prohibits such an act. Those rules have the force of law (Rev. Stat., Sec. 4405).

And yet, on the trial, they studiously avoided any reference to the alleged use of the searchlight, despite the fact that they called as witnesses the four men who were in charge of the "Elder's" navigation at the time of the collision, Pilot Patterson, Mate Whiteman, Quartermaster Asktedt and Lookout Olson. Not a single question was asked them seeking to elicit any testimony to support the charge, though the information, upon which the averments of the answer were based, must have been obtained from some or all of the four witnesses, for they alone of the "Elder's" crew would know its truth.

The neglect to interrogate the witnesses cannot be explained as oversight, for on cross-examination, Captain Patterson's attention was specifically called to his testimony before the U. S. Inspectors. The significant omission of proctors to have Captain Patterson reiterate to the court the statement made before the inspectors, makes his testimony worth noting. On that hearing he said:

"At the same time he had a searchlight on all the time, which blinded me and blinded the quartermaster in the wheel house. He was throwing his searchlight around over the river, and on the barges, and up the river, and at times the searchlight was right in the face of me and the man at the wheel" (Ap. 382).

If Captain Patterson thus spoke truthfully before the inspectors; if what was alleged in the answer was a fact, why was not such evidence laid before the trial court by appellant, upon whose shoulders rests the burden of showing that the "Elder" was free from fault and that the "Kern" was guilty of negligence contributing to the collision? If worth pleading, it was equally valuable as proof, for it is manifest that if the searchlight was turned upon the "Elder's" bridge and the pilot blinded, it was an interference with the navigation of the "Elder" as an overtaking vessel, which would have at least condemned the "Kern".

It is not sufficient for proctors to say that they passed it over because it was of no "causative effect", for such an assumption on their part would not only be a usurpation of the function of the court, but would be the wilful withholding of facts of which the



lower court was entitled to be advised, in consonance with the spirit of admiralty practice, in order that justice might be administered.

What then was the reason for Captain Patterson's silence before that court? Explanation is had in the fact that when the "Kern" was raised, the searchlight was found pointing just as the "Kern's" witnesses testified it had been used at all times prior to the collision, over the port bow, and in the further fact that it was, by reason of its construction, physically impossible to have so turned the searchlight as to have thrown its rays on a steamer approaching from astern, as the "Elder" overtook the "Kern" (Ap. 151, 152, 483).

We do not attribute to Captain Patterson a wilful misstatement to appellant or the inspectors; we take the more charitable view of a mistake. But if a mistake, it is a confession to an inaccurate knowledge and very poor recollection of the facts leading to the collision. If Captain Patterson made so grievous an error as to think that he had been blinded by the "Kern's" searchlight, when such was a physical impossibility, why is his recollection as to the actual incidents of the collision any more reliable? If his testimony before the inspectors was not the result of a faulty recollection, his credibility is impugned, and the maxim, "*Falsus in uno, falsus in omnibus*," applies.

*The Santissima Trinidad and The St. Ander,*  
7 Wheat. 283; 5 L. Ed. 454.

#### **The "Kern's" lookout.**

Appellant charged that at no time during the period mentioned did the steamship "Daniel Kern" have,

keep or maintain lookout, or any lookout, but, on the contrary, those in charge of her negligently and carelessly during all of said time failed to have or keep a lookout on board said steamship "Daniel Kern". There is no averment in the answer as to the alleged absence of a lookout, contributing to the collision, though, for such possible reason alone, was such absence, if any, of concern.

But was there no lookout? The testimony shows that the Mate Anderson and sailors were forward of the forecastlehead of the "Kern", as well as the watchman on the barge. The pilot was on the bridge and, in such a position, had an unobstructed view, as did those on the forecastlehead, of the approaching "Elder". So that the allegations as to want of a proper lookout fails in the face of incontrovertible evidence to the contrary.

There is no dispute in the case as to the number of whistles blown by the "Elder", for her navigating officers assert, and those on the "Kern" admit, that two single blast passing whistles were given. Whatever may have been the distance at which the *first whistle was blown\**, the pilot in command on the bridge and the mate and sailors on the forecastlehead of the "Kern" were advised from personal observation of the approach of the "Elder" from the moment of her first whistle, so that the alleged want of a lookout, even were it true, could not be regarded as a contributory cause. Upon this point the lower court found:

"The officers in charge of the 'Kern' discovered in due time the approach of the 'Elder', and the

\*The trial court found the distance to be one-half mile (Ap. 53-4).

action taken was in pursuance of such discovery, and of the movement and signals given by the 'Elder' \* \* \*." (Ap. 63-4.)

Commenting on the absence of a lookout on the "Aurora", the Circuit Court of Appeals for the Second Circuit in

*The Aurora*, 198 Fed. 383,

said:

"\* \* \* the fact that she had no lookout \* \* \* is negligible. If a lookout had been on the bow of the tow, he could have done nothing more than report to the pilot of the tug what he knew already, namely, that the Coleraine was crossing the river on an oblique course."

In

*The Livingstone*, 113 Fed. 879,

it was charged that the "Traverse" was in fault for its failure to have a lookout. The court found that the absence of a lookout did not contribute to the collision, saying:

"No other vessel interfered in any way with the navigation of either of the colliding vessels. \* \* \* The *Livingstone* was sighted and seen by all when miles away. Her colored lights were made out a mile and a half off, signal of one whistle blown to her, and the navigation of the *Traverse* conducted with reference to her. The view was clear and unobstructed, and, so far as the evidence shows, nothing of any character or description occurred concerning the approach of the *Livingstone* of which the navigator of the *Traverse* was not advised from personal observation. Under these circumstances, we are not prepared to say that the absence of a lookout contributed to the injury. The *Victory* and The

Plymothian, 168 U. S. 429, 18 Sup. St. 149, 42 L. Ed. 519.”

In

*The Blue Jacket*, 144 U. S. 371; 36 L. Ed. 469-477,  
the Supreme Court said:

“It is well settled that the absence of a lookout is not material where the presence of one would not have availed to prevent a collision.”

See, also,

*The Admiral Farragut*, 10 Wall. 334; 19 L. Ed. 946.

Granting for the sake of argument, that no proper lookout was being maintained, still the “Kern” is not to be condemned as in fault, for she did all that was required of an overtaken vessel. Had the “Kern” been moving at the time, her sole duty would have been to keep her course and speed.

Art. 21 of the Inland Rules.

Being constructively under way, within the intent of the rules (Preliminary Statement 2, Inland Rules), the analogous obligation, of continuing to do that which she was doing when the overtaking vessel approached, rested upon her, just as the duty of maintaining her course and speed rests upon the moving and overtaken vessel. The latter requirement is imposed upon all privileged vessels (Art. 21), and has its purpose in the necessity of requiring some uniform standard of conduct on the part of the privileged vessel, in order that the burdened one may safely determine the conduct necessary on her part to carry out her duty of keeping clear.



It is within the reason of the rule, then, to hold, where a vessel, being overtaken by another, is dead in the water, though constructively under way, because she is not drifting or made fast to the shore or aground, that her duty to the overtaking vessel is to remain at a standstill. If this be the duty of the overtaken vessel under those conditions, then the "Kern" fulfilled her obligations to the "Elder", for she did not change her position from what it had been when the "Elder" blew her first whistle until the collision was inevitable. Her going ahead at the latter moment, appellant admitted in the lower court to be an act *in extremis* (Ap. 228). So that in the contemplation of the law the "Kern" did all that she was required to do in holding, figuratively speaking, her course and speed. Having thus fulfilled her obligation, as the privileged vessel, to the "Elder", as the burdened vessel, she is not liable even though one of her crew was not acting in the sole capacity of lookout.

*The Fannie*, 11 Wall. 238; 20 L. Ed. 114, 115, 116;

*The Delaware*, 161 U. S. 459; 40 L. Ed. 771, 775;

*The Havanna*, 54 Fed. 411;

*The Columbian*, 100 Fed. 991, 994;

*The Fannie Hayden*, 137 Fed. 280, 283;

*The Annie W.*, 181 Fed. 604, 607;

*The Greystoke Castle*, 199 Fed. 521.

Viewed in its every aspect, therefore, the "Kern" is not to be held in fault for an alleged want of a proper lookout.

#### The exchange of barges.

We know of no law making it unlawful or wrongful for the steamers "Hercules" and "Kern" to exchange

their barges on the Columbia River, as they did the night of the collision.

Appellee was at the time, as it had been for some years, engaged in furnishing rock to the U. S. Government for use in the construction of the Columbia River jetty. The rock was loaded onto the barges at its quarry, above Vancouver, and as the Government steamboat inspectors would not permit the "Hercules" to go to Fort Stevens, and the water up river was too shallow for the "Kern", an exchange of barges by the two steamers was a matter of necessity.

So far as the exchange of barges on the night in question was concerned, there is little disagreement as to where and how it took place. The "Kern", bringing up the light barges, let go of them somewhere in the vicinity of Cooper's Point, out of the channel, well toward the Oregon shore, and turned around and proceeded to the loaded barges. In the meantime, the "Hercules", which had passed down with the loaded barges, brought them to a standstill opposite Waterford, about 1000 feet off the Washington shore, and  $\frac{3}{4}$  of a mile from the Oregon side of the river, and waited until the "Kern" had dropped the empty barges and was turned around and well down toward the loaded ones. As the "Kern" approached, the "Hercules" backed out from between the two side barges, in time to get away from them and turned around, so that the "Kern" could take her place with as little trouble and disarrangement of the barges as possible.

By this method of exchange, the loaded barges were not left drifting alone, except for the short time neces-

sarily required in one steamer leaving them and the other picking them up, and while the empty barges were adrift for a longer period, they were well outside of the channel used by the larger vessels. Surely there was nothing in this dropping of the loaded barges by the "Hercules" and the almost immediate picking them up by the "Kern", which menaced navigation! The steamers and barges had as much right to be there, and use those waters for that purpose, as had the "Elder", with no more obligation on their part to hug the Oregon shore than there was for the "Elder" to have taken that course, as the depth of water permitted. It may be true that the "Kern" and the "Hercules" had no right to obstruct navigation, but how can it be seriously urged that with 1000 feet of clear water on the Washington side and  $\frac{3}{4}$  of a mile on the Oregon shore, navigation was obstructed?

Appellant devotes considerably over a page of his answer and a portion of its brief to reiterated charges of gross carelessness and negligence in exchanging the barges, but does not allege how such an exchange was the proximate cause of the collision on the part of the "Kern". He did say in the lower court, however, that had the "Kern" been actually under way down said river with said tow, or been engaged in making fast thereto off at one side toward the Oregon shore, from such course or fairway, the said collision could not and would not have occurred. The question as to the barges not being under way has nothing to do with the place of exchange, with respect to which the gross carelessness is charged in the answer. And while it

may be true that the collision would not have occurred had the "Kern" and her barges been over on the Oregon shore, neither would it have happened had they not been on the river at all. The point is that they were where they had a right to be, and the mere *passive* fact of their presence cannot be held a contributing cause of the collision, so long as ample room for passage was afforded. That the exchange of barges at that point did not obstruct navigation is best evidenced by the allegation of appellant's answer, wherein he avers:

"That there was then and there and at said time between 1000 and 1200 feet of deep water sufficient for the 'Elder' to navigate between the said 'Daniel Kern' and the said Washington shore \* \* \* for this claimant avers that there was ample room for the 'Elder' to pass to the right of the 'Kern' and between her and the Washington shore \* \* \*'" (Ap. 20-1).

Captain Patterson of the "Elder" also testified that he had plenty of fairway (Ap. 382).

A singularly decisive case, in point of fact, is that of *The James T. Easton*, 27 Fed. 464, 466.

The leaving of the empty barges adrift off Cooper's Point certainly had nothing to do with the collision; nor, with ample breadth of channel and depth of water between the loaded barges and the Washington shore, all of which was fully known to the "Elder," is it possible to conceive how the act of the "Hercules" in dropping, and the "Kern" in picking up, the loaded barges can be said to have been the proximate cause of the collision. It is not the case of a steamer striking



an unknown vessel, adrift in the fairway, for the presence of the "Kern" and the work in which she was engaged was known to the "Elder" on the confession of her officers, and the finding of the trial court (Ap. 60), at least from the moment she changed her course at Cooper's point.

Appellant apparently realizes the soundness of the trial court's opinion upon this point, for he now says in his brief (page 17), "The Kern was within its rights in handling its tow in the fairway."

With the elimination of the foregoing defenses there remains for consideration the sole question of the "Kern's" whistles. It was upon the theory that the "Kern" was in fault for not having responded with similar whistles to the one-blast passing signals given by the "Elder" and in blowing the danger signal that the proctors rested their entire case upon the trial below, so far as concerned the question of possible fault on the part of the "Kern". If the alleged refusal of the "Kern" to answer in the affirmative the starboard passing signals of the "Elder" and the fact that it did give the danger signal were not the contributory causes of the collision, then liability must rest upon the "Elder".

#### The "Kern's" whistles.

It is admitted by both parties that the "Elder" blew two single blast passing whistles, indicating a desire to pass the "Kern" on the latter's starboard side. The question of the distance of the "Elder" from the "Kern" when the former gave her first

passing signal is of no importance in itself in determining the question of the "Kern's" alleged fault. The lower court, however, found that the "Elder" was then approximately a half a mile distant (Ap. 54).

The lower court also found that the "Kern" promptly answered the first passing whistle of the "Elder," not with a whistle that indicated permission to pass, but with the danger signal. Upon this question the court, after applying the well-settled rule that the testimony of witnesses affirming that they heard or saw a thing is entitled to greater weight than the negative testimony of other witnesses who affirm that they did not hear or see it, said:

"Further than this, I am impelled to the firm conviction that the 'Kern' gave prompt response to the first signal of the 'Elder' with four short blasts of her whistle; and not only this, I am of the opinion that the officers of the 'Elder' testifying, or at least one or more of them in authority, did hear such response from the 'Kern,' and that the 'Elder' is chargeable with positive knowledge that it was given" (Ap. 56-7).

Upon the well-settled rule that such finding is conclusive, unless manifestly contrary to the evidence, that question should require no further comment. Rather than being contrary to the evidence the testimony conclusively shows that the first whistle of the "Elder" was answered.

Pilot Moran testified that he responded with a danger signal to *both* of the starboard passing whistles blown by the "Elder". In this he was corroborated by Captain Copeland (Ap. 147), Mate Anderson (Ap. 443), Chief Engineer Spaulding (Ap. 256), Jensen (Ap. 241),

Arneson (Ap. 263), all of the "Kern"; by Captain Church (Ap. 210-11) and Mate Hale (Ap. 232-3) of the "Hercules"; and by fisherman Nissen who was salmon fishing on the river abreast of Eureka Cannery (Ap. 137-8).

It is not surprising, therefore, that we find the trial court saying in its opinion:

"\* \* \* I am of the opinion that the officers of the 'Elder' testifying, or at least one or more of them in authority, did hear such response from the 'Kern' " (Ap. 56-7).

There can be no question but that the "Kern" responded with a danger signal to the "Elder's" first whistle, and yet whether she did or not is immaterial so far as concerns the alleged fault of the "Kern". The error charged is that in response to the "Elder's" second request for permission to pass, the "Kern" blew a danger signal while the "Elder" was at such a distance and in such a position as to have been able to safely pass the "Kern" to starboard. If she was not in such position, it is self-evident that no criticism is to be made of the "Kern's" response to the "Elder's" second whistle, regardless as to how favorable may have been the latter's position for passing at the time of her first whistle; if the "Elder" was so placed that she could have safely passed on the second whistle, then it is of no consequence as to how far distant from the "Kern" the "Elder's" first whistle was blown, or whether it was answered. The material question with which we are concerned, then, in passing upon the alleged contributory fault of the "Kern",

is that of the "Kern's" legal responsibility for having blown the danger signal in response to the "Elder's" second passing whistle.

Appellant in his brief, at page 31, states the question before the court as follows:

"The point to this case is whether the Elder was a half a mile off at least, why did the Kern try to stop her?"

Was the blowing of the danger signals by the "Kern" a contributory fault?

Rule III, Article 18, provides:

"If, when steam-vessels are approaching each other, either vessel fails to understand *the course or intention of the other, from any cause, the vessel so in doubt shall immediately* signify the same by giving several short and rapid blasts, not less than four, of the steam whistle."

Rule VIII, Article 18, provides:

"When steam-vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam whistle, as a signal of such desire, and if the vessel ahead answers with one blast she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam-whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or, *if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point*, she shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they



have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel."

In

Vol. 25 of *Amer. & Eng. Encyc. of Law*, at page 966, the authors say:

"If the vessel ahead does not think it safe for the vessel astern to attempt to pass, she must give the danger signal, \* \* \*. The vessel ahead must in all cases answer the signal of the overtaking vessel either by an assenting signal or by the danger signal" (citing cases).

Rule II of the Inspectors' Rules provides:

"Steam vessels are forbidden to use what has become technically known among pilots as 'CROSS SIGNALS', that is, answering one whistle with two, and answering two whistles with one. *In all cases, and under all circumstances, a pilot receiving either of the whistle signals provided in the rules, which for any reason he deems injudicious to comply with instead of answering it with a cross signal, shall at once sound the danger signal and observe the rule applying thereto.*"

Rule I of the same Rules provides:

"*If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle, the DANGER SIGNAL.*"

The law is thus clearly defined that the danger signals *may not only be blown, but must be blown,*

(1) when an overtaken vessel *does not think it safe for the overtaking vessel to pass*; (2) when, *from any cause*, a vessel fails to understand the *course or intention of the other*; and (3) when a pilot receives a passing signal compliance with which he, *for any reason*, deems *injudicious*.

There have thus been prescribed signals and a course of navigation, which are intended to prevent collisions, whenever there is *any doubt* as to the absolute safety for one vessel to pass another. If there was any doubt on the part of Pilot Moran as to the *course or intention* of the "Elder", or *any reason* causing him to deem it *injudicious* to favorably respond to the "Elder's" request to pass, there was not only ample authority in the law for his taking the course prescribed, but a correlative duty to do so, for otherwise, the effect would be to prevent collisions only when the doubt as to the safety of passing was of some degree not defined in the law. The obligation, to say nothing of the right, to blow the danger signal, exists without discretion when there is *any doubt* as to safety of passing. If this were not the law, it would necessarily follow that the master of an overtaken vessel, before deciding whether to favorably respond to a passing signal, would be required not only to have a doubt as to the safety of passing, but to mentally stop and ask himself *whether such doubt was reasonable*. The giving of the danger signal would then depend, not upon the pilot's having a doubt as to the safety of passing, but upon his judgment as to the reasonableness of such doubt. But the rules of navigation pro-

vide that when, *in all cases and under all circumstances, for any reason, the pilot deems it injudicious to comply with the passing signal, or when he fails to understand the course or intention of the other; or when he does not think it safe for the vessel astern to attempt to pass at that point, the danger signal shall be blown.*

This being the law, one question alone remains for our consideration in determining whether the "Kern" was in fault as charged,—Did Pilot Moran have *any doubt* as to the course or intention of the "Elder", making it injudicious in his mind to assent to her passing signals?

To ask the question is but to answer it, for the very fact that he deliberately blew the danger signal indicates that, for some reason, he did not deem it judicious to reply with a like whistle. What this reason was is clear,—the fear of a collision, a doubt as to the safety of his own vessel from the oncoming "Elder".

When the first whistle of the "Elder" was blown, the "Kern" was heading down stream, across the sterns of the rock barges, which were canted toward the Oregon shore. The mate had just gotten out a port bow line from the "Kern" to the starboard barge, and was about to put a strain upon it (Ap. 439). Moran, who, at the time, was in the pilot house, upon hearing the "Elder's" whistle, went outside and looked astern\* to see whence the whistle came, and

\* Appellant at page 34 of his brief states that there "is no pilot house from which the pilot \* \* \* has to go in order to see". Such statement is correct with respect to seeing objects forward or to either side of the pilot house, but obviously it is inaccurate with respect to seeing vessels approaching directly from astern. The rear of the pilot house, which is constructed of wood, obstructs the latter view.

finding a steamer heading for the "Kern", with all three of her lights showing, he waited a moment to see if she were altering her course, and finding that she was not, returned to the pilot house and blew the danger signal (Ap. 83-4).

He then immediately returned to the starboard rail of the bridge, to watch the "Elder", and after he had been there a few seconds, a second one blast whistle was received from the "Elder", and seeing that she was still coming on, showing her masthead and port and starboard lights, and heading right for the "Kern", he again jumped to the whistle as quickly as he could, and gave the danger signal for the second time (Ap. 85-6). He then went outside again, and for the third time, found the "Elder" still approaching head on (Ap. 87). Waiting a moment, he noticed her swing to port, and, concluding that she was backing, he ordered the "Kern's" engine full speed ahead (Ap. 87), with her helm hard a'port in the hope to thereby avoid the collision (Ap. 87, 105). The "Kern" had not moved to exceed 40 feet, if she had that, before the "Elder" struck her on her starboard quarter at an angle of about 34 degrees abaft the "Kern's" beam, cutting into her near the center line, and driving her against the barges with such force as to practically cut and break her stern off.

At the time he went ahead full speed, Moran thought the "Elder" to be very close, probably 25 to 30 feet (Ap. 88), while he judged her to be about 1000 feet off when he blew the first danger signal (Ap. 117), though it is apparent that his estimate of distances was approximate (Ap. 205).



The importance of the foregoing facts to the question we are discussing is that by reason of the course the "Elder" was running, approaching the "Kern" *head on, showing all three of her lights.* (Opinion, Ap. 54), and because of her apparent nearness to the "Kern", there was instilled into the pilot's mind a doubt as to the course or intention of the "Elder", the fear of collision, for he says, and who can gainsay him:

"I made up my mind she was coming right for me, going to run me down." (Ap. 84.)

"Well my reason was that I concluded there was nothing going to happen but a collision; that he was going to run right into me and I thought I would warn him of the danger he was approaching." (Ap. 102.)

That Moran was possessed of such fear of collision is perhaps best evidenced, not by his testimony on the trial, but by his warning to Captain Copeland after the "Elder's" first whistle, while the master was still in bed, "to get out as he (Moran) thought the 'Elder' was going to run them down" (Ap. 148). It was while so in doubt as to the course and intention of the "Elder" and because of his apprehension of collision, that Moran blew the danger signals. Is he to be condemned therefor, and the "Kern" held to be in fault? If so, it must be for but one reason, and that is, that his doubt or fear was not well founded, for, otherwise, the mere fact of doubt itself would be a justification. But as we have pointed out, the navigation rules do not provide for the blowing of the danger signal only when the pilot has a reasonable doubt. To

give them such construction would be to inject a standard of judgment, measured by what the ordinary prudent man would do or think, and yet the right to blow the danger signal exists *in all cases and under all circumstances* when a pilot receives either of the signals provided in the rules (i. e., passing signals) compliance with which he (not someone else), *for any reason, deems injudicious*. The right to blow the danger signal is measured by the judgment of the pilot in command, not by a standard of judgment of other men, for the rule provides that the danger signal is to be blown when *he*, the *pilot*, deems it injudicious to comply with the passing signal. His judgment at the time is entitled to great weight. Obviously if it had been followed by the "Elder" a collision would have been avoided.

And yet proctors for appellant would condemn Moran because certain witnesses, as the result of calm deliberation in the court room, taking time to think and reason, concluded that in their judgment, the "Elder", when 500 to 1000 feet astern of the "Kern", could have ported and cleared the latter had the "Kern" answered the "Elder's" second whistle with an assenting signal. Granting that this were true, and Capain Moran admits that it might be done, it does not lessen the fact that at the time he gave the danger signal he was possessed of doubt or apprehension as to his vessel's safety. He alone was the one to judge, and he chose the side of safety. And now because of it, proctors would hold him in fault for the resulting collision.

*The James T. Easton*, 27 Fed. 464.

Of him it might well be said, as did the court of the master of the "Sieman" in

*The North Star*, 151 Fed. 168, 174.

"He ought not to be criticised \* \* \* for exercising extreme caution."

The fact that the "Elder" collided with the "Kern" without any great change of course is *prima facie* evidence of danger of collision.

*Wilder S. S. Co. v. Low*, 112 Fed. 161, 166.

Not only, then, was Captain Moran apprehensive of the safety of his own vessel from the oncoming "Elder", but subsequent events showed how substantial were the grounds for such misgiving. To condemn Moran, under the circumstances, would necessitate the setting aside of the rules of navigation requiring the blowing of the danger signal whenever doubt exists as to the course or intention of the other vessel, and would disregard the imminency of the peril which afterward overtook the "Kern".

If such danger of collision existed, certainly Moran cannot be condemned for having obeyed the mandate of the rules, though proctors may assert, despite the fact that there is no supporting allegation in the answer, that at the moment the *second* danger signal was given, Moran knew that compliance therewith would necessarily precipitate a collision. Such assertion, however, would admit that danger of collision was then imminent, and would not only bring Moran's action within the privilege, to say nothing of the obligation, of the navigation rules, but would cast aside the testi-

mony of Pilot Patterson, that at the time the danger signal was received in answer to the "Elder's" second passing signal, the "Elder" was considerably distant to starboard and astern of the "Kern", for Patterson claims to have shaped his course immediately after passing Cooper's Point so as to carry the "Kern" at least half a point on the "Elder's" port bow.

But more significant than repudiating the testimony of Captain Patterson as to the course of the "Elder", would be the assumption of knowledge on the part of Moran of the inability of the "Elder" to comply with the danger signal and avoid a collision. It is manifest that such knowledge would require, among other things, special information as to the stopping and reversing ability of the "Elder's" engines under various conditions of trim and draft of the steamer, as well as, on the one hand, her ability to swing, and, on the other hand, the inability of her helm to change her course, to say nothing of the other innumerable elements which enter into the control of a ship's movements. No proof was offered on the trial to show that Moran possessed any knowledge as to the inability of the "Elder" to comply with the danger signal, so that on the record, any such contention would necessarily involve assumptions against Moran, for otherwise he could not be charged with knowledge that he knew a compliance with the danger signal meant collision. But with the burden of proof on appellant to show the "Kern" in fault, such burden cannot be sustained by such theoretical presumptions. The absurdity of any contention that Moran must have



known that compliance with the danger signal would result in collision, is best evidenced by Patterson's statement that he, himself, did not know the distance within which the "Elder" could be stopped, and by his delayed efforts to avoid the collision by stopping and reversing. If he did not know the "Elder's" stopping ability, how can presumption of such knowledge be entertained against Moran to support the burden of proof resting on appellant? And yet any contention that Moran should be condemned because of knowledge that compliance with the danger signal meant collision, is necessarily premised upon such presumption.

If such a presumption should in any case be sufficient to condemn the pilot of an overtaken vessel, the natural effect of such a principle of law would be to cause the pilot to hesitate between doubt as to the safety of his vessel, if he did not blow the danger signal, and apprehension of legal liability if he gave the danger signal and collision should result from inability of the overtaking vessel to comply therewith and avoid collision. It is needless to say that the rules of navigation were not designed to ever make prevention of collision dependent upon the hesitation of a pilot over the question of greater responsibility. On the contrary, they prescribe a course of navigation, which, if followed with promptitude and decision, would make avoidance of collision certain. For instance, if an overtaking steamer did not, without consent of the overtaken vessel, approach within such distance but what she could stop before the vessel being overtaken

is reached, the rules would be complied with and occasion for such presumption as we have been discussing would not arise. Further consideration of the proposition of thus condemning Moran will serve but to emphasize its unsoundness in law and its utter inconsistency with the spirit and intent of the rules of navigation.

Appellant attempts to make something out of what unquestionably was a misunderstanding on the part of Pilot Moran as to the necessity of an overtaking vessel to alter her course before she received an assent to her passing signal. Rule VIII of Article 18 seems to contemplate that the changing of the helm shall follow the assent to pass, for it provides, "and if the vessel ahead answers with one blast, she shall put her helm to port," etc. But it is a far cry from the mistake of Pilot Moran as to the meaning of such rule to the holding which appellant would ask this court to base upon such misunderstanding. An analysis of his brief will show that every material contention which he makes as to the alleged error of the "Kern" harks back to the misunderstanding as though by iteration and reiteration it could thereby be developed into a contributory fault. Not only that, but every contention as to the alleged proper navigation of the "Elder" and the alleged fault on the part of the "Kern" is based upon the assumption that the latter did not respond to the first passing whistle of the "Elder". Not once throughout his brief does he suggest that the misunderstanding of Moran was contributory to the collision.

Apparently appellant's position is that it is mandatory to let the vessel astern pass where it can be safely done. Such construction of the rule, however, is exclusive of any other contingency other than room to pass and makes it mandatory upon the vessel ahead to assent to the request of the vessel astern to pass, provided there is, as appellant contends, abundant room on either side of the vessel ahead for such passing. It is, furthermore, clear that such construction predicates the right to give the danger signal solely upon the question of room to pass and disregards entirely the course of the overtaking vessel, no matter with what degree of apprehension it may justly fill the navigating officer of the overtaken vessel. It is because there was such room to pass between the "Kern" and the Washington shore, of which there can be no question, that appellant would condemn the "Kern", for, if there had been any doubt of such room, on appellant's own admission Moran would have been justified in giving the danger signals, even though he did so believing that the request to pass should be accompanied by a change of helm.

Pressed to its conclusion by circumstances similar to those in the case at bar, such construction of the obligations of the rule would require the assenting signal so long as there was space to pass, even though the overtaking vessel approached at full speed directly toward the vessel ahead, so as to imperil her and run her down, unless, by a dexterous twirl of her steering wheel, her course is shifted and she glides by, however close may be the call. The one question which the

vessel ahead might consider would be, is there room to pass at that point? At what point? In the case at bar the point between the "Kern" and the Washington shore. The navigating officer of the vessel ahead, upon appellant's theory, is not to be permitted to take into consideration, in determining whether the danger or passing signal shall be given, the course, speed or intention of the approaching vessel, though it be such that only by a perfectly executed maneuver can the overtaking vessel pass. Upon such a theory the course, speed or intention of the overtaking vessel, however fraught with danger it may be, cannot be considered by the vessel ahead if the giving of the assenting whistle is mandatory in all cases, provided only there is sufficient room. But, if the course, speed or intention of the overtaking vessel may be given consideration by the vessel ahead, then it is apparent that the mandatoriness of the assenting whistle is conditioned upon other considerations than simply that of "room to pass".

It is manifest that appellant's construction of the obligations of an overtaken vessel under Rule VIII entirely disregards the equally mandatory Article 24, for, if Article 24 makes it imperative that "every vessel, overtaking any other, shall keep out of the way of the overtaken vessel," the latter certainly has the right to pass judgment as to whether that obligation is being fulfilled, as the duty of the vessel astern to keep clear is but saying that the vessel ahead has the right of being free of danger of collision. And, if the right to pass judgment exists, the overtaken vessel has the



right to express by some means its apprehension of possible peril involved in the course of the overtaking vessel and such expression can only be by the danger signal.

It might be suggested by appellant that Article 24 makes no provision for the danger signal, but the answer to that is that the rule prescribes a course of navigation which does not contemplate the necessity of the danger signal. It forbids a certain course of navigation on the part of the overtaking vessel, just as the last provision of Rule VIII forbids a similar course of navigation on the part of the vessel ahead, to wit:

“The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel.”

The latter rule does not provide for the danger signal by the overtaking vessel if the vessel ahead crowds upon her course, yet no one would have the temerity to suggest that, if such crowding was apparent or apprehended from the course of the vessel ahead, the overtaking vessel would not have the right to give the danger signal because the rule did not specifically prescribe it in such contingency. Equally, then, would the vessel ahead have the right to give the danger signal if she were apprehensive of her safety from the course of the overtaking vessel. This was exactly what Moran did, and that his apprehension was well founded was immediately demonstrated by the collision.

*The Carroll*, 8 Wall. 302, 305.

Article 24 provides:

“Notwithstanding anything contained in these rules every vessel, overtaking another, shall keep out of the way of the overtaken vessel.”

“Notwithstanding anything contained in these rules” must mean, among other things, that notwithstanding the obligations on the overtaken vessel under Rule VIII, Article 18, the overtaking vessel shall keep out of the way of the vessel being overtaken. With such a duty resting upon the overtaking vessel, she must at all times be in such a position and subject to such control that her movements shall not bring her into collision with the vessel ahead if the latter does not give the assenting whistle provided by Rule VIII. This, then, prohibits the overtaking vessel from approaching the vessel ahead at such a course and at such a rate of speed that she cannot stop, if so commanded by the danger signal, without colliding with the overtaken vessel, *and yet this was exactly the position in which Patterson placed the “Elder”*, with the result that he could not keep her out of the way of the “Kern”. He was, therefore, in violation of the rule as a more specific examination of the navigation of the “Elder” will demonstrate.

If, then, there is no ground for condemning Moran for blowing the danger signal, because of alleged knowledge that it would precipitate a collision, we are brought back to the original proposition of holding him in fault because he blew the danger signal at a time when the “Elder” could have ported and passed the “Kern” in safety had the latter assented thereto,

although Moran was then apprehensive of the safety of his own vessel and danger of collision was impending. As we have said, doubt as to the course or intention of the "Elder", causing Moran to deem it injudicious to comply with the passing signal, was sufficient justification for such signal. But, even if such doubt did not exist and there was no danger of collision impending, the blowing of the danger signal would not condemn the "Kern", for she can only be held in fault for a contributory act. In the absence of some movement on her part or failure of duty to get out of the way, the giving of the danger signal cannot *per se* be held to be a contributory cause. It might afford ground for complaint against the pilot to the United States Steamboat Inspectors, but cannot render the "Kern" liable. It was so held in

*The Governor*, Fed. Cas. 5645.

"We may censure any rigid adherence to strict right by which one competing boat interposes embarrassments in the way of her competitor, and may regret the want of a magnanimous and liberal course of conduct which might relieve a vessel of superior speed and endeavoring to get ahead, from delay or difficulty in accomplishing that object. But the Court is only empowered to adjudicate the legal rights of the one and the responsibility of the other."

In

*The North Star*, 151 Fed. 168,

the Court of Appeals for the Second Circuit held that failure to give an assenting whistle to a passing signal blown by an overtaking vessel, even though there was

room to pass, was not a contributory fault, the court saying:

“The question whether the Siemens was also in fault for the collision depends in part upon the meaning to be given to rule 5. This rule imposes upon the steamer ahead the duty of co-operating with the vessel astern when the vessels have reached a point where they can pass safely. *It is not its meaning that the vessel ahead shall give an assenting signal and slacken to a slow speed whenever requested to do so by a vessel astern provided there is room for the latter to pass safely; for if this were the requirement, it would be inconsistent with Rules 20 and 22 of the Act of Congress.* Those rules, which but express the law of navigation that everywhere obtains, recognize the privilege of the vessel ahead to maintain her speed, and the duty of the vessel astern to keep out of the way, until the vessel astern has overtaken the vessel ahead. All rules of navigation are qualified by the fundamental one that in obeying them due regard must be had to any special circumstances rendering a departure from them necessary to avoid immediate danger; and it is the contemplation of rule 5 that when the vessel ahead has been overtaken, and the overtaking vessel is about to pass ahead, the immediate danger which then arises requires that the former shall forego her privilege, and so govern her movements as to assist in avoiding it. Then it is, and not before, that rule 5 means that the vessel ahead, after signifying her willingness by signals, should ‘slacken to a slow rate of speed’.

*Thus interpreting the rule, we think the Siemens was not in fault for her failure to give an assenting signal to the first signal from the North Star.”*

In other words, the court held that as Rule 5, requiring the vessel which had been overtaken to forego her privilege because of the immediate danger from pass-



ing, did not begin to operate until such danger of passing actually existed, there was no obligation under the rules requiring the vessel being overtaken to assent to a request to pass from the vessel astern, even though there was room for passing, as such requirement would be inconsistent with the privilege accorded the overtaken vessel by Rules 20 and 22 of the Act of Congress. If Rules 20 and 22 secured to the "Siemens" such a right as exempted her from condemnation for her refusal to answer the "North Star's" request to pass, then equally is it impossible to hold the "Kern" in fault for having dissented to the "Elder's" request to pass, as the same rights were secured to the "Kern" by Articles 21 and 24 of the Inland Rules, as were accorded to the "Siemens" by Rules 20 and 22 of the Act of Congress.

This court should not hold that Articles 21 and 24 of the Inland Rules are susceptible of the construction that the overtaken vessel must assent to the request of the overtaking vessel to pass if it can be accomplished in safety, when the Circuit Court of Appeals for the Second Circuit has held that a river regulation (Rule 5), if given such construction, would violate Rules 20 and 22 of the Act of Congress. If Rules 20 and 22 were to be given such construction, Rule 5 would not be inconsistent with the Act of Congress, but in harmony with it.

And in

*The Fontana*, 119 Fed. 853, 856,  
Circuit Judge Lurton, delivering the opinion of the

Court of Appeals for the Sixth Circuit, said to the same effect:

“Twice or three times the Appomattox refused the Interocean’s request to pass up on her port hand. *It is not essential that this should have been denied upon thoroughly good reasons*, or that the master of the Appomattox discriminated arbitrarily in consenting a few moments before that another and larger steamer might pass up on the same side.”

If it is not essential that a denial of a request to pass should be based upon thoroughly good reasons, it follows that the mere blowing of a danger signal by an overtaken vessel in answer to the passing signal of the overtaking vessel, cannot, of itself, render the former liable. In other words, the danger signal *per se* is not to be deemed a contributory cause of a collision which subsequently occurred between the passing vessels. It is necessary, before the overtaken steamer shall be held in fault, that some act, or the omission of some duty, on her part, shall have been of causative effect in producing the collision. Applied to the “Kern”, she is not to be condemned from the mere fact of having blown the danger signal, even though it may have been at a time when the “Elder” could have ported and cleared with safety. If she is to be held in fault, it is not because the “Elder” could have safely passed by porting, for that involves alone the giving of the danger signal, but because of the danger signals being coupled with some act, or the omission of some duty, which contributed to the collision. And yet the “Kern” was absolutely passive, rigidly per-

forming her duty as the overtaken vessel in maintaining the position she occupied at the time the passing signals were given, without crowding upon the course of the "Elder" or interfering with her navigation. It is natural, therefore, to find the trial court reaching the conclusion that it was

"\* \* \* satisfied that Moran did not refuse his consent to pass arbitrarily, or with any wanton purpose of vexing her or impeding navigation. He assumed for his own safety that he ought to withhold his assent because the Elder was heading directly for his boat."

And it is not surprising to find it saying:

"\* \* \* I have concluded that the mistake of Moran was not the proximate contributing cause of the collision."

This court should, therefore, apply the principle announced by it in

*The Yucatan*, 226 Fed. 437, 441,

where, speaking through Judge Rudkin, it said:

"The court below found that the proximate cause was the careless and negligent handling of the Yucatan, coupled with the failure to have a licensed pilot on board familiar with the river, the winds, and the currents. The rule is well established that the findings of the trial judge in admiralty will not be set aside, except for clear manifestation of error. An examination of the record convinces us that the findings on the question of negligence and proximate cause are fully warranted by the testimony, and the decree is accordingly affirmed."

The very nature of the collision explains appellant's shifting defenses and contentions.

Here we have the simple case of the "Kern", headed down-stream, dead in the water, making fast to three loaded barges, with one thousand feet of clear water to starboard and a half mile of navigable channel to port, on a clear starlight night, with the water slack and no appreciable current, being run down despite warning signals, from almost directly astern by the "Elder", a fast ocean-going steamer which had seen the "Kern" at least half a mile distant.

In a somewhat similar case, *The Cephalonia*, 29 Fed. 332, Judge Benedict, in speaking of a collision between an overtaking and overtaken vessel, said:

"The duty of the tug, whistles or no whistles, was to hold her course. It was no part of her duty to get out of the way of the steamer. If, as the steamer approached the tug from behind, the tug held her course, she discharged all her duty. \* \* \* While in the performance of that duty, she was run over and sunk by the steamer. No doubt can be entertained as to the liability of the steamship for the damages that resulted."

Is it any surprise that the burden is with the "Elder" to show fault on the part of the "Kern" and, despite resourceful efforts, that such burden has not been sustained?

*The James T. Easton*, 27 Fed. 464.

Not only was there resting upon the "Elder", as the overtaking vessel, the burden of proving that the collision was occasioned by fault or neglect on the part of the "Kern", but, to exonerate herself, also the duty of showing that the collision occurred without her fault or negligent or bad navigation; having failed in the former has she succeeded in the latter?



**Was the "Elder" free from fault?**

Upon rounding Cooper's Point, Captain Patterson claims to have laid the "Elder's" course (1) so as to take her probably not over 300 to 400 feet off the Washington shore (Ap. 318, 345-6); (2) so as at the same time to carry the "Kern" one-half point on the "Elder's" port bow" (Ap. 318).

The bearings taken by Captain Crowe show that the "Kern" sunk 990 feet off the Washington shore and about five-eighths of a mile below Cooper's Point (Ap. 275-6).

It is thus manifest that if on steadying on her course below Cooper's Point the "Elder" had the "Kern" half a point on her port bow, Captain Patterson was in error in estimating her passing distance off the Washington shore at 300 or 400 feet from the "half point course" would carry him 730 feet off shore and 260 feet inshore from the "Kern". This discrepancy is of importance in that it shows, as do other matters in the record, the inaccuracy of Captain Patterson's knowledge of his course that night.

If the "Elder" was proceeding upon a course which would have carried her within 400 feet of the Washington shore, it is self-evident that her masthead and port lights alone would have been visible to the "Kern", and equally would it have been true if the "Elder" had shaped her course after rounding Cooper's Point so as to hold the "Kern" half a point on her port bow. If the "Elder's" three running lights, red, masthead and green, were visible to the "Kern", as the lower court found the fact to be (Ap. 54), then

either the screen of the "Elder's" green light was defective, thereby making the green light visible across the "Elder's" bow to the "Kern", or the "Elder" was not carrying the "Kern" over half a point on her port bow. And as the "Elder" continued on her course toward the "Kern" it is a geometrical certainty that the angle of the "Kern's" position to the "Elder's" bow increased (Ap. 422-3); thereby, in effect, placing the "Kern" more and more on the "Elder's" port bow as the distance between the two decreased, making it impossible for the "Elder's" green light to have been visible to the "Kern". If the green light was visible when the "Kern's" danger signals were blown, it goes without saying that Captain Patterson was again in error as to the "Elder's" course.

Was the "Elder's" green light visible to the "Kern"? Pilot Moran says that from the time the "Elder" blew her first whistle to the moment of the collision, the "Elder" was coming toward him showing all three lights (Ap. 86). In this he was corroborated by Mate Anderson (Ap. 441) and Seaman Arneson (Ap. 274), and the pilot's reason for having blown the danger signals was that he was alarmed by the very fact of the visibility of the "Elder's" running lights, for it indicated to him that the "Elder" was approaching on a course which would run the "Kern" down. Find that the green light was not seen by the pilot and those on the "Kern" who were in a position to observe the lights, and you destroy the pilot's motive and reason for having given the danger signals. Is it reasonable to believe that an experienced pilot on board of the

“Kern”, lying dead in the water, making fast to a fleet of barges, with no tide or current to move them (Ap. 32) would have blown a danger signal to the “Elder” showing only her red light, indicating that she was overtaking the “Kern” on a course which would pass the latter to starboard? It would not be conduct consistent with ordinary navigation for no danger of collision would have been apparent, but, on the contrary, the blinding of the “Elder’s” green light would have indicated to those on the “Kern” that the “Elder” was not approaching the former, but was on a passing course to starboard, either parallel with or diverging from the “Kern” without the remotest possibility of collision unless the course of the “Elder” was changed so as to show her green light.

Then, too, the circumstances of the collision, the angle of the blow, the time elapsing between the reversing of the “Elder” and the impact, all go to substantiate the fact of the visibility of the “Elder’s” green light. We, therefore, feel confident that this court will have no difficulty in agreeing with the lower court in the conclusion that Moran was correct in his statement as to the course of the “Elder”, and if Moran was right, Patterson’s recollection was necessarily at fault.

Upon blowing the “Elder’s” first passing whistle, and hearing no response, although the “Kern’s” danger signal was blown, Captain Patterson claims to have slowed the “Elder’s” engines, and at this reduced speed the “Elder” continued to forge ahead toward the “Kern”. The pilot then blew a second passing signal, again requesting permission to pass the “Kern” to

starboard, and again receiving the danger signal in reply Captain Patterson instantly ordered the "Elder's" engines reversed full speed and her helm put hard a'starboard, but almost immediately the "Elder" struck the "Kern". *Was there any fault in such navigation?*

The "Elder" was in violation of Article 24, and Rule 8 of Article 18 of the Inland Rules for she failed to keep out of the way of the "Kern" as an overtaken vessel.

If Captain Patterson heard the "Kern's" danger signal in answer to the "Elder's" first passing whistle, as found by the lower court (Ap. 56-7), then the "Elder" *was at fault in not so checking her speed so as to avoid overtaking the "Kern" until passing signals were properly exchanged.*

If the "Elder's" pilot did not hear any response from the "Kern" to his first passing whistle, then with the "Elder" an overtaking vessel he should have acted upon such silence as a dissent to his request to pass, and should have so checked the "Elder's" speed as to avoid overtaking the "Kern" until proper passing signals were exchanged. In not treating the failure to hear an answering signal to his passing whistle as a dissent, *and in continuing on his course until he could not stop without ramming the "Kern"*, Captain Patterson was in fault. That failure to receive a response to a passing signal is to be acted upon as a dissenting whistle, has been held in many cases.



For instance, in

*The Orange*, 46 Fed. 411-412,

it was said:

“The fact that no reply to her signal came from the ferry-boat was notice to her that her signal had not been heard, and it was her duty to stop at once.”

In

*The Florence*, 68 Fed. 940-942,

Judge Brown said:

“The failure to hear the ‘Eldorado’s’ whistles was not, however, a contributing cause to the collision, because it did not mislead the ‘Eldorado’, or give her the least apparent right to go ahead of the ‘Florence’. *It was practically equivalent to an expressed dissent* because the ‘Eldorado’ had no right to go ahead without an expressed assent of the ‘Florence’.”

*The City of Chester*, 78 Fed. 186.

Not only was the “Elder” at fault in the things she failed to do, but even more negligent was the course of her navigation leading to the collision.

Rounding Cooper’s Point, Pilot Patterson headed her for what he knew to be the “Kern” (Ap. 60) for he had just passed the empty barges abreast of the point on a course which left his running lights open to the “Kern” despite the fact that he had 1000 feet of clear water to starboard and over half a mile to port of the “Kern”. He blew a one whistle to the “Kern” somewhere between 100 and 1500 feet below Cooper’s Point as near as can be ascertained, and claims to have received no response thereto. Thereupon he slowed the

"Elder" down, and immediately sounded a second whistle, and received a danger signal from the "Kern", and instantly ordered the mate to ring full speed astern and the quartermaster to put his helm hard a'starboard. The former immediately complied and repeated the signal several times. The quartermaster starboarded his helm as quickly as possible—and then the collision.

When the "Kern's" second danger signal was received in response to the "Elder's" second whistle, the "Elder" was so close to the "Kern" that collision was apparently inevitable.

Patterson testified on direct examination that the reversing full speed astern order was rung continuously until they were almost to the "Kern" because he wanted to notify his engineer that something was wrong; that he wanted to back his ship as hard as he could (Ap. 329). Yet, when pressed immediately afterward on cross-examination as to the urgency he was evasive, but finally explained the necessity of going full speed astern as that he had seen the barges and boat ahead; seen an obstruction of some kind, but did not know whether it was the barges or what it was then (Ap. 331-2). This, notwithstanding the fact that he had just passed the "Hercules" and empty barges, and must have seen the "Kern's" searchlight illuminating the barges. Indeed, before the inspectors, he had had the searchlight in his face! Later, however, he admitted that at the time he backed full speed, he knew that the collision was imminent (Ap. 337-8).

The exigency of the situation was more frankly stated by the mate, who worked the telegraph on the

pilot's orders. He says that the reason for his continued ringing was that he wanted to impress upon the engineer the necessity of giving her all she could stand, because he could see that it was hardly possible to avoid collision so close were they to the "Kern". And, even then, it was a matter of doubt as to whether they could stop her (Ap. 404).

The extremity of the "Elder" at the time that full speed astern was ordered, is also shown by the statement of the quartermaster, who testified that they struck the "Kern" almost immediately after he put her helm over to starboard, and that she had not swung much to port (Ap. 421-423). It was perhaps most graphically described by the first officer who said that he turned out when the engine was reversed, and was probably getting into his "handiest rags" when the collision came (Ap. 429-433-4). And even the lookout knew when the engine was reversed that they were going to strike the "Kern," so close were they to her (Ap. 428).

The proximity of the "Elder" to the "Kern" when the reversing order was given, was admitted by the pilot in other ways.

It is provided in the Inspector's Rules under the title "Signals," preceding Rule I:

"When vessels are in sight of one another a steam vessel under way whose engines are going at full speed astern shall indicate the fact by three short blasts on the whistle."

It, therefore, became obligatory upon Captain Patterson to blow the three short blasts thus required,

when the "Elder's" engine was reversed full speed. *He did not obey the rule*, however, and when pressed on cross-examination as to his reasons for not doing so, he testified:

"A. I didn't have no opportunity to do it.

Q. Why not?

A. Was trying to find what this object was ahead of me." \* \* \*

"Q. Why didn't you?

A. I said, I didn't have time to do it. I was trying to find out what this obstruction was ahead of me" (Ap. 365).

Again, Patterson, though not in accord with the mate and lookout of the "Elder", insisted that the whistles blown by the "Kern" in answer to his second passing signal were *cross-whistles*. If he so understood them, while it was his duty to stop and back the "Elder's" engines, it also was *obligatory* upon him *to at once sound the danger signal*.

Rule II, *Inspector's Rules*.

*He did not obey the rule however.*

Why? His explanation shows the extremity of the "Elder" and the imminency of collision to which he had previously testified.

"A. Because I didn't have an opportunity to do it. I was trying to find what was ahead of me. There must be some obstruction ahead of me" (Ap. 339).

"A. I didn't have an opportunity. I was trying to find out what was the matter. I says to the second mate, 'For God's sake, what were those fellows trying to do?'

Q. You didn't have an opportunity to blow?

A. I was busy trying to find out what this obstruction was ahead of me.



Q. How long did it take you to find out?

A. I didn't have any time to fool any time away, I will tell you that.

Q. What is that?

A. Didn't have much time to fool away.

Q. When you say you didn't have much time to fool away, *you meant you didn't have very much time between the time you received the danger signal and the collision.* Is that what you mean?

A. *That is what I mean, yes, certainly*" (Ap. 341).

The fact of the collision coming within so short a time after the reversing order that Patterson did not have an opportunity to blow either the danger signal or the three short blasts indicating that the "Elder" was reversing, coupled with the testimony of the mate that at the time of reversing he could see that they could hardly avoid a collision, and that of the lookout that at that time he knew they were going to strike, and that of the quartermaster that the collision came almost immediately after he got his helm hard over, and that the "Elder" did not have time to swing very much, speaks more emphatically, than can we, of the dangerous proximity of the "Elder." And yet, appellant says that Moran had no right to fear a collision.

Then, too, the angle and sharpness of the cut in the "Kern's" side, and the fact that the "Elder" cut approximately 12 feet into the "Kern" to within ten inches of the center line of her main deck, crunching through the guard, planking, and white oak frames, 10 x 12 inches, spaced 18 inches centers at the top

and built in solidly at the bottom, breaking five deck frames of oak, and cutting through the ceiling, deck planking, bulwarks and cabin, and driving the "Kern" around against the barges with sufficient force to practically break off her stern, demonstrates not only that the quartermaster was correct in saying that she had only altered her course slightly to port, but that at the moment of impact the "Elder" had enormous headway. Having reversed under an order for full speed astern, with that order repeated and repeated so as to get her full backing power, the fact that she was still traveling at a high rate of speed at the time of the collision, shows conclusively that the "Elder" was in dangerous proximity to the "Kern" when the reversing order was given.

The effect of the foregoing testimony, the failure of the pilot to blow the danger signals and the three short blasts and his reasons therefor, and the angle and character of the cut, is to make certain that the "Elder" was but a short distance off the "Kern" when her engine was reversed.

And yet, to diverge a moment, proctors would condemn Moran for having blown the danger signal. Isn't it apparent, if the nearness and course of the "Elder" was so fraught with risk of collision as to fill Patterson with fear when he heard the "Kern's" danger signal in answer to his second passing whistle, that to condemn Moran would be to hold, that despite a justified apprehension of the safety of the "Kern" because of the course, speed and nearness of the "Elder", he should have foregone his fear and have

trusted to the "Elder" not continuing to hold the course upon which she was approaching, and have assumed that her pilot would clear the "Kern"? But the rules require that the danger signal should be blown when there is *any doubt as to the course or intention* of the other vessel.

The point of it all is that the "Elder" was so navigated that, when the "Kern" answered her second passing whistle with the danger signal, she had gotten into such a position—so close to the "Kern"—she could not be stopped before striking the latter.

**The point for the court's consideration is the question as to whether that was proper navigation.**

The "Elder" was an overtaking vessel. Appellant so admitted when he conceded in the lower court that the "Kern's" green light was not visible to the "Elder,"\* and that the allegations of the answer in that regard were without foundation. As such an overtaking vessel, she was the burdened vessel, with a positive obligation resting upon her of keeping out of the way of the "Kern". If the rules of navigation prescribing such duty are to be given force and effect, is it not manifest that they require the burdened vessel to be so navigated that she shall not get into such a position that she cannot be stopped without colliding with the vessel she is approaching and overtaking. In no other manner can the obligation of keeping clear be fulfilled.

\* There his proctor said: "There is no question between us on this point; that is, that the 'Kern' was pointing downstream in such a position that we couldn't see either of her side lights, and that would indicate she was pointing the other way from us downstream."

“To be so near the vessel ahead in that place was a fault, and a fault that caused the collision.”

*The Hackensack*, 32 Fed. 800.

The effect of the burden thus placed upon the “Elder” was that she should not be permitted to approach the “Kern”, without giving a proper passing signal and having it concurred in, to within such distance that she could not be stopped without striking her. Otherwise, the rule requiring the “Elder” to keep clear would be for naught. There was then a zone of danger—that distance within which she could not be stopped without striking the “Kern”—into which proper navigation prohibited the “Elder” from entering, and yet her pilot, without knowing the distance within which she could be stopped (Ap. 370-1-2-3) deliberately approached the “Kern” to within such distance, and at such a speed, that, when he suddenly backed her full speed, he, and everyone concerned in her navigation, knew that collision with the vessel being overtaken must inevitably result. Is it possible it can be said that such was proper navigation? And yet, if the “Elder” is to be relieved of liability, such must be the contention of appellant. We are loath to believe that this court will give such contention its serious consideration.

What excuse have appellant’s proctors offered for the course of the “Elder”? Not alone have they attempted none, but despite the fact that the burden of proof is upon the “Elder” to show that the collision was occasioned by no fault on her part but by some fault or neglect on the part of the “Kern”, they have



failed to cite a single case which even tends to sustain their position. The reason is, of course, that it cannot be found.

**Further faults of the "Elder".**

Appellant's theory of his own case confesses a further fault of the "Elder" for by the admission of Patterson, as well as the others concerned in the "Elder's" navigation that the collision was unavoidable by reversing full speed, the "Elder" was not only in violation of Rule VIII of Article 18 and Article 24, but also of Article 27 of the Inland Rules. The latter rule imposed upon the "Elder" the duty of keeping clear even though it might have required a departure from the other rules. It follows, therefore, that if the collision could have been avoided by any other course of navigation than that pursued by Patterson, the "Elder" was in fault for not adopting it. Upon this point the lower court said:

"The 'Elder' should have been eagerly mindful of her rapid approach to the 'Kern' on the course she was steering, and should have avoided running so near to the latter as to put her in peril of a collision. Under the circumstances she was at liberty to depart from the letter of the rules and steer to the starboard of the 'Kern', notwithstanding the refusal of the latter to let her pass—this to avoid 'immediate danger'" (Ap. 59).

The court's opinion on this question also is well supported by the authorities. In

*The North Star*, 151 Fed. 168, 173,

the court said:

“All rules of navigation are qualified by the fundamental one that in obeying them due regard must be had to any special circumstances rendering a departure from them necessary to avoid immediate danger.”

The Circuit Court of Appeals for the Second Circuit announced the same principle in

*The Mauch Chunk*, 154 Fed. 182,

Circuit Judge Coxe, saying:

“The navigation rules \* \* \* are enacted to prevent collisions, not to induce them, and perverse adherence to the rules is not justifiable when it is manifest that such a course is certain to result in disaster.”

Proctors for appellant were tireless in their efforts in the lower court to show the ability of the “Elder” to clear the “Kern” by porting or starboarding her helm when within 1000 feet, or even 500 feet, of the latter. Patterson, himself, stated on direct examination that the “Elder” could not only have cleared the “Kern” in 500 feet, *but could turn half way around in 1000 feet* (Ap. 321). He estimated his distance from the “Kern” when he received the danger signal in response to his second passing whistle at 1000 to 1500 feet (Ap. 321). It is, therefore, manifest, if proctors rely upon the testimony of their own pilot, that had Patterson put the “Elder’s” helm either hard a’starboard or hard a’port when he received the “Kern’s” second danger signal, the “Elder” would not only have cleared the “Kern,” but would have never reached the line of her position. Knowing that a collision was imminent (Ap. 337-8), Patterson admits

that skillful navigation would have avoided the collision.

Again, Patterson persisted that the "Kern's" answering whistles to his second passing signal were *cross whistles*. If they were cross whistles, the only interpretation Patterson could place upon them was that of an unwillingness for the "Elder" to pass the "Kern" on the latter's starboard side, and the willingness that she pass to port. They could not be construed by Patterson as a refusal to pass at all for such dissent is by Rule VIII of Article 18 to be indicated by the danger whistles. Though cross whistles were forbidden, if the signals given by the "Kern" were understood as cross whistles, they did not indicate any obstruction, as contended by Patterson, to the port of the "Kern." On the contrary, though unlawful whistles, they indicated to him a willingness to have the latter pass on the "Kern's" port side. While under Rule II of the Inspector's Rules, it was Captain Patterson's duty to blow the danger signal and stop and reverse, yet if he knew that such maneuver would probably precipitate a collision, whereas by going ahead on a hard a'starboard helm, the "Elder" would clear the "Kern" to port, it was Patterson's duty under Article 27 to disregard Rule II and follow the course which would avoid the collision. Failing to do so, he was in fault.

**The decree should be affirmed with instructions to enter judgment against appellant and his stipulator on the appeal bond.**

The court will observe from the decree (Ap. 636) that although appellee's damages were assessed at the

sum of \$41,839.83, judgment for the sum of \$25,000 only was entered against the United States Fidelity & Guaranty Company, stipulator on the bond given for the release of the "Elder", that sum being the amount specified in the bond. The United States Fidelity & Guaranty Company has not appealed from the judgment or decree entered against it, but is alone named in the title of this appeal as an appellee.

Costs and interest on the sum of \$25,000 from the first day of May, 1910, were awarded against appellant, who appeared and answered as owner of the "Elder" and who defended and contested and still resists appellee's demands.

An appeal bond and supersedeas in the sum of \$40,250 was later given by appellant, when he took his appeal, with the Fidelity & Deposit Company of Maryland as surety. The condition of the last named bond is such that if appellant abides by and performs whatever decree may be rendered by this court, the obligation will be null and void; otherwise it is to remain in full force and effect. That latter bond is therefore subject to the decree of this court.

Upon this point the Supreme Court in

*The Wanata*, 95 U. S. 600; 24 L. ed. 461.

said:

"Where the claimant appeals from the decree of the District Court, the bond and other stipulations follow the cause into the Circuit Court; and, upon the affirmation of the decree, the fruits of the appeal bond and other stipulations may be obtained in the same manner as in the court below, they



being in fact nothing more than a security taken to enforce the original decree, and are in the nature of a stipulation in the admiralty."

It is submitted, therefore, that, even if the court should be of the opinion that this appeal presents any question for its consideration (the decree from which the appeal is taken being based on the lower court's findings of fact), the "Elder" has not sustained the burden resting upon her as the overtaking vessel of proving herself free from fault, for the record shows her to have been in fault in the following particulars:

(1) She violated Article 24, and Rule 8 of Article 18 of the Inland Rules, in not keeping clear of the "Kern".

(2) She was in fault in not so checking her speed as to avoid overtaking the "Kern" until passing signals were properly exchanged.

(3) She was in fault in being so navigated that when her engine was reversed upon receiving the danger signal in answer to her second passing whistle, she could not be stopped without striking the "Kern".

(4) She violated Article 27 of the Inland Rules in not adopting some course of navigation other than that pursued by Patterson.

We respectfully submit, therefore, that the decree of the lower court should be affirmed in all respects with directions to enter judgment for costs and interest as heretofore directed by the district court against appel-

lant and his stipulator on the appeal bond—The Fidelity and Deposit Company of Maryland.

Dated, San Francisco,  
February 8, 1918.

Respectfully submitted,

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

WOOD, MONTAGUE, HUNT & COOKINGHAM,

McCUTCHEN, OLNEY & WILLARD,

*Proctors for Appellee,*

*Columbia Contract Company.*



In The  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

---

CHARLES P. DOE, CLAIMANT OF THE STEAMSHIP  
"GEORGE W. ELDER," HER ENGINES, ETC.,  
*Appellant,*

VS.

COLUMBIA CONTRACT COMPANY, A CORPORATION, AND  
UNITED STATES FIDELITY AND GUARANTY COM-  
PANY, STIPULATORS,  
*Appellees.*

---

**Reply Brief of Appellant**

---

H. W. GLENSOR, ERNEST G. CLEWE, SANDERSON REED,  
Proctors for Appellant.

EDWARD J. McCUTCHEON, IRA A. CAMPBELL, WOOD,  
MONTAGUE, HUNT & COOKINGHAM, McCUTCHEON,  
OLNEY & WILLARD,

Proctors for Appellee,  
Columbia Contract Company.





In The  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

---

CHARLES P. DOE, CLAIMANT OF THE STEAMSHIP  
"GEORGE W. ELDER," HER ENGINES, ETC.,  
*Appellant,*

VS.

COLUMBIA CONTRACT COMPANY, A CORPORATION, AND  
UNITED STATES FIDELITY AND GUARANTY COM-  
PANY, STIPULATORS,  
*Appellees.*

---

**Reply Brief of Appellant**

---

Replying to that part of the argument in appellee's brief touching upon the assignment of errors, it is pointed out that all assignments of error that could be made are made. The assignments of error cover the action of the court below on all points upon which the court ruled. The appellee being the prevailing party in the court below could have presented findings of fact or asked for rulings on particular points, which, however, was not done. The court merely made its finding of negligence and gave a decree.

The appellee further contends that the decree should be affirmed because of the well settled and universal rule that in admiralty causes the decree of the lower court will not be reversed unless manifestly contrary to the evidence. The appellant points out that there still remain the various questions of law and of application of the rules raised in the court below and brought here on appeal, and in addition, there is no finding of fact made by the court below that the appellant has sought to upset. The appellant merely says that in addition to the findings of the court below are facts which the court might have found and did not. It will appear from the briefs that there really is little, if any, question of fact between the parties.

Paragraph 3 of the appellee's brief begins and ends with the proposition that the Elder was an overtaking vessel.

This is the theory upon which the suit was brought. The following is taken from the libel at page 9 of the Apostles, to-wit:

"The libelant avers that said collision was occasioned solely through negligence and carelessness of those in charge of the navigation of the George W. Elder in that she did not keep out of the way of the Daniel Kern and attempted to pass the Daniel Kern from astern without receiving the assent of the Daniel Kern indicated by the appropriate whistle so to do and attempted to pass when the Daniel Kern had blown four short and rapid blasts of her steam whistle indicating that it was not

safe for the George W. Elder to attempt to pass at that point.”

The libelant and appellee then proceeds in support of this contention to undertake to apply Art. 24 of Rule 9, and not only maintains that this article should be applied to the facts in all its strictness but being applied, puts the Elder at fault. The court below held this to be a close question. The appellant undertakes to show that the application of this rule under which the Elder was put at fault by the court below, is erroneous. To bring the court to the conclusion that the facts in this cause create the condition of an overtaking and an overtaken vessel with regard to the Elder and the Kern, the appellee has cited many cases. In these cases, however, it will be seen that the vessels actually were within that category, to-wit: they were on the same course and proceeding on a steady course. But in doing this, and in citing these cases of admittedly overtaking and overtaken vessels, the appellee avoids the question involved in this suit raised in the lower court and raised by the appeal, which is: Are the facts such as to call for the application of the rule? The rule exists, but is it to be applied herein?

On page 7 of the appellee's brief it is stated in a footnote that the appellant has by admissions in his answer and admissions in the lower court, put his contentions beyond the consideration of the court. This footnote indicates an admission by



the claimant and appellant in the latter's answer. To show the inaccuracy of the appellee in this matter, the court's attention is directed to said answer on pages 13, 15 and 16 of the Apostles. In the argument, it was thought it might be necessary to ask for an amendment on this point because the appellee's brief had not been received by the undersigned until the day previous to the hearing, but a further investigation of the record shows that there is no basis for the appellee's suggestion. In the first place, there is no admission of law or of any fact which precludes the appellant from raising the questions on appeal. In the second place, the claimant and appellant specifically pleads, on page 13, that the Kern had a head line at the time, running from the "Kern" to the port barge of her tow, "and this claimant avers that the said Kern was then and there made fast to said port barge, and this claimant is informed and believes, and he therefore alleges the fact to be, that the said Kern was then and there made fast to the starboard barge and that her bow was against the middle barge of the tow and between the port and starboard barges of said tow. This claimant denies that the said Daniel Kern was headed down the Columbia River, and denies that the said barges were or that any of them was headed substantially or at all at right angles to her port bow or towards the Oregon shore of the Columbia River. On the contrary, this claimant avers that the said Kern and all of the said barges

were headed towards the Washington shore of the Columbia River and obliquely across the channel of said Columbia River.”

This allegation does away with the unfounded charge that the claimant has admitted itself out of court, and in fact, the evidence supports the facts alleged, and the libelant now admits, as shown by the record, that the barges were headed towards the Washington shore and obliquely or otherwise across the channel of the Columbia River, and the Kern's nose was against the stern of the barges, more or less up and down stream.

Also, on page 7 of appellee's brief is a statement that the appellant's proctors conceded in the lower court that the Elder was an overtaking vessel. The undersigned did not take part in the trial, but if there is such a statement in the record the undersigned has failed to see it. It is true that the law of overtaking vessels was discussed pro and con and it is true the proctor for the claimant in the court below argued the rule applying to overtaking vessels to show that even if the Kern were an overtaken vessel, nevertheless it was to blame. To say, however, that the claimant and appellant has admitted a principle of law or the application of a rule to its detriment is going much further than the undersigned has found the record justifies.

It would seem that the contention of the appellee that the Kern was an “overtaken” vessel is made impossible by its own argument that the

Kern threw herself crosswise of the stream before the collision occurred. The Kern's testimony all is that the pilot on the Kern rang for full speed ahead and in so doing by reason of his position against the barges and the fact that the wheel was lashed, the Kern became crosswise in the channel. To claim, then, that the rule of an overtaken and an overtaking vessel applies would dispose of the contention of the appellee that the act of the pilot in sending the Kern full speed ahead, with her wheel lashed, was done "*in extremis*." It is submitted that the Kern cannot claim to be both within and without the rule. If it claims that the rule of an overtaking vessel applies, it must admit that it was crosswise of the channel, that it became crosswise of the channel by the act of the pilot and after it had signalled to the Elder. Under the authorities, however, the appellant cannot believe that the court below was correct in holding the Elder to be an overtaking vessel.

If the rule covering an overtaken vessel applies, then this act cannot be held to be *in extremis* and the Kern should be held to have impeded and baffled the Elder.

In each of the cases cited as an authority on the question of an overtaking and an overtaken vessel, the courts say either that the ships were "running in the same direction, the one astern of the other" or "the duty of the overtaking vessel is to keep out of the way of the one leading her" or "*while the overtaken vessel keeps her course*." In each and

every one of the cases cited the vessels were on a steady course and on the same course and were in fact, an overtaken and an overtaking vessel. In this suit, however, such are not the facts.

The appellee contends that the burden of proof rests upon the Elder of proving (a) that she was free from fault, (b) that the Kern was guilty of negligence contributing to the collision. This claim of throwing the burden of proof on the Elder is due to the erroneous contention of the appellee that the Elder was the overtaking vessel, because if she were not the overtaking vessel no law could be found under which the burden would be thrown upon the Elder. The authorities cited by the appellee in support of the contention that the burden of proof is on the Elder are all cases of an overtaking and an overtaken vessel. The holding that the burden rests upon the overtaking vessel is clearly reasonable, for when one vessel is pursuing another on a steady course and overtaking the other, in the nature of things it is manifestly the business of the overtaking vessel, being faster, not to run down the overtaken vessel, and on the other hand it is the law that the overtaken vessel shall not "baffle the overtaking vessel or crowd her off her course or interfere with her," this being both in the rules and in the decisions.

*The Governor*, Fed. Cs. 5645.

*The Rhode Island*, Fed. Cs. 11745.



But where the rule governing overtaking vessels cannot be applied because the facts do not justify it, then as a matter of course a portion of the rule cannot be applied and the burden of proof shifted.

It was the view of the court below that the rule governing overtaking vessels should be applied in this cause and it was this that caused the court below to throw the burden on the Elder and at the most that the libelant can claim, the showing is that the Kern stopped the Elder without reasonable explanation.

“If the general conditions of navigation and the relative speed of the vessels are such that a steamer astern can safely pass the other, she is at liberty to do so; and she cannot be deprived of her privilege by the neglect or contumely of the steamer ahead.”

*The North Star*, 151 Fed. 172.

The court below found that the Elder signalled from a half a mile to five-eighths of a mile from the Kern and the court below refers repeatedly to the fact that the Elder curved to port on reversing.

It was the contumely of the Kern that deprived the Elder of her privilege of passing and it being a dark night the Elder could do nothing but reverse. In the daylight she would undoubtedly have kept her course and passed.

The appellee proceeds so far as to criticize the appellant's policy of trying the cause. The appel-

lee finds fault with the appellant because the appellant has not proved certain facts set forth in his answer, and the appellee yields to a tendency to infer a conversation between Capt. Patterson and the appellant's proctors in the court below.

Not to overlook this matter, the court is reminded that Capt. Patterson was not and is not in the employ of the Elder or the claimant. Under the Oregon compulsory pilotage law Capt. Patterson went on the Elder and took charge of her. It is bad enough that the collision occurred, but it is the height of injustice in the law to consider the acts of Capt. Patterson after the collision as in any way binding or affecting the claimant. Capt. Patterson, being an Oregon state pilot, made such statements and took such steps as he might have seen fit. If he told the appellant's proctors in the court below that the search light of the Kern was flashing in his eyes, it was no crime on the part of said proctors to plead these facts. If Capt. Patterson caused facts to be pleaded that misled the claimant in any respect, this should be charged against the State of Oregon and not against claimant.

Nor does the fact that the appellant filed more than one defense in the law throw the burden of proof against the claimant. Nor does Capt. Patterson's testimony on the witness stand bind the claimant as an admission, nor does the fact that he failed to testify in support of certain points affect the claimant.

The real facts are what the law seeks. The facts in this cause are known. What are not established by the decree of the court below are established beyond question by the evidence. The Kern's wheel was lashed, she was pointing downstream, the barges were across her bow, she had been backing and filling, the pilot gave orders for full speed ahead, and threw her crosswise of the channel with her wheel still lashed, she was not an overtaken vessel, she stopped the Elder when she had no right to and created a condition that brought about a peculiar accident, inasmuch as the curving course of the Elder reversing happened to bring her into collision with the Kern, and the Elder, even then, might have missed the Kern if the Kern had remained stationary. As a matter of fact the Elder could not possibly have overtaken the Kern, could not have reached the Kern, and could not have touched the Kern, if the Kern had been on a course down the river. If the Kern had been an overtaken vessel she could not have been touched by the Elder.

As to the matter of the searchlight and the testimony of Capt. Patterson before the inspectors and the answer of the appellant to that effect: Is it the law that because this answer was not proved that the Elder is guilty? If the Oregon pilot reported a condition of facts on which an answer was based and which he did not substantiate at the trial does this change the facts or alter the conditions? Does this entitle the appellee to expect the court to relieve it from the overt act of Capt.

Moran in not knowing the rules, in sounding the danger signal when he “baffled” the Elder and in throwing his vessel crosswise in the current with his wheel lashed? Does this entitle the libellant to claim that the Kern was an overtaken vessel?

It seems to the appellant that all that part of the appellee’s brief on the subject of the searchlight is calculated to lead the discussion away from the material facts.

The real and lawyerlike disposition of the fact that the appellant pleaded an answer which was not substantiated with regard to the searchlight is that there was no evidence on the subject and it was not sustained, but the fact that it was pleaded and not proven does not penalize the appellant and claimant. Moreover the assumption of the appellee as to conditions regarding the searchlight can easily be refuted. The claim that the searchlight, when the Kern was raised, was found pointing just over the port bow is of not much importance. Divers were on the Kern. Beside, interested and intelligent witnesses were there that photographed the searchlight after she was raised. In fact, what is a searchlight for if it is not for use on a dark, clear night?

It has been shown from the beginning of this cause and so found by the court that there was no lookout on the Kern and the argument in the appellee’s brief that there might have been a lookout, the appellant trusts will receive the consideration it deserves.



The testimony is that all of the crew of the Kern were forward making fast to barges. Moran's testimony is not that he was on the bridge of the Kern. The pilot Moran was in the pilothouse of the Kern and he was looking forward. There was an unobstructed view of the Elder, which is the reason the appellant says that there was negligence on the part of the Kern. With an unobstructed view, without a lookout, with all of the crew occupied in removing an obstruction of danger to passing vessels that their employers had placed in the river, they either saw or did not see the Elder. If they saw her, they had no excuse for sounding the danger signal. She was half a mile away. If they did not see her, they are to blame.

The matter of a lookout is discussed in the case of

*William A. Jamison*, 241 Fed. 950-952.

This is a case of a tug making fast to a tow. The court says:

"The fault of the *Jamison*, if any, is in the absence of a lookout. Both deckhands were at the stern of the tug taking in the lines and the master in the pilot house was both navigating and keeping a lookout. *This is a divided duty, which the law will not accept as a performance.*"

This case seems to be on all fours with the present suit. The deck hands were all busy. Capt. Moran says he was in the pilot house, not navigating at all, but making fast to the tows, which is

something the law should not tolerate and the above court holds that it does not tolerate.

This case also holds that a vessel not navigating upon any course cannot apply the steering and sailing rules. (Pg. 951.)

The appellee in the opinion of the appellant, has yielded its entire right to any claim for negligence against the appellant on page 21 of its brief, where it says, "HAD THE 'KERN' BEEN MOVING AT THE TIME HER SOLE DUTY WOULD HAVE BEEN TO KEEP HER COURSE AND SPEED."

She was not moving. Her wheel was lashed. She was adrift. She was trying to pick up a dangerous menace in the ship channel.

There is no such condition as being "constructively" under way.

The appellant has claimed from the outset that the Kern was "privileged." As indicated in our opening brief, the Columbia Contract Company has tried to establish the proposition that it has the privileges of the river and in the appellee's brief this point is brought out for argument by the appellee itself. The appellee claims to have occupied a privileged position on the river. If the court wishes to hold that this is the law it will be yielded to by the pilots and the captains of the river boats. It will, however, bring about many accidents in addition to those already created and caused by the rock barges in the river.

The position and contention of the appellee is

clearly shown by the following statement on page 21 of its brief:

“Being constructively under way, within the intent of the rules (Preliminary Statement 2, Inland Rules), the analogous obligation, of continuing to do that which she was doing when the overtaking vessel approached, rested upon her, just as the duty of maintaining her course and speed rests upon the moving and overtaken vessel. The latter requirement is imposed upon all privileged vessels (Art. 21), and has its purpose in the necessity of requiring some uniform standard of conduct on the part of the privileged vessel, in order that the burdened one may safely determine the conduct necessary on her part to carry out her duty of keeping clear.”

The appellee goes so far as to argue that a boat may be “constructively” one thing or another—that it could be “constructively” backing when as a matter of fact it is going forward, that it could be “constructively” on a steady course when its wheel is lashed and it is adrift, and that it could “constructively” have a lookout when it has none, that its pilot could be “constructively” beyond criticism although not cognizant of the regulations.

On page 22 of appellee’s brief this claim that a ship may be “constructively” one thing when it is another, is elucidated and the contention of the appellee that the overtaking rule cannot apply in this cause seems to be made clear. The appellee here says where a vessel dead in the water “though

constructively under way because she is not drifting (which the Kern was) or made fast to the shore or ground, she is constructively going in one direction on a steady course." The appellee further claims "that in a contemplation of the law the Kern did all she was required in holding, *figuratively speaking*, her course and speed. Having thus fulfilled her obligation as the *privileged* vessel to the Elder as the burdened vessel, she is not liable, even though one of her crew was not active in the sole capacity of lookout." Such a contention as this is one demanding attention, if for no other reason than to learn whether the law is going to hold that a ship may be "figuratively speaking" a privileged vessel, or "figuratively speaking" holding her course and speed when as a matter of fact her wheel is lashed, she is adrift with no lookout and her tow crosswise of the ship channel.

In short, the appellee maintains that the Kern was not to blame "*figuratively speaking*" and as a matter of fact and *not* "figuratively speaking" that the Elder is to blame, and the appellant submits that the admissions of the Kern on this appeal make clear the actual condition of the Kern's attitude.

Nor is this appellant to be led to one side to any contention or argument as to the leaving of the barges in the ship's channel. The appellant knows it is a continuous menace and the appellant knows that there is no law which prevents it or which can prevent it, because it becomes necessary for boats



in doing business on the water to make exchanges. Nevertheless, it seems to the appellant that where there is such a width of water as there is at this point, it was a case of gross neglect on the part of the libellant to leave the barges in the ship's channel. Why were not the loaded barges left out of the channel? No excuse is given for not so doing.

The appellee further and continuously applies law as to the matter of an overtaking vessel and an overtaken vessel and cites American and English Encyclopedia of Law, to which the appellant replies, as heretofore, that to create this condition the ships must fulfill the conditions described in Rule VIII, Art. 18, page 29, of the appellee's brief:

“When steam vessels are running in the same direction and on a steady course”

as explained by the cases heretofore cited.

At this point a note appears on page 32 of the appellee's brief to the effect that the pilot house of the Kern prevented a view astern.

The undersigned has no hesitation in saying there ought to be a strip of glass through which the man at the wheel on the Kern can easily see astern. It is beyond the probabilities that the pilot house of the Kern was so enclosed as to prevent an outlook and if this is so and as stated by the appellee, the appellant should have claimed that it is gross negligence on the part of the Kern to have such a pilot house. If the man in the pilot house cannot see aft, then a lookout was a necessity. The pho-

tograph does not show, to the recollection of the undersigned, that the man at the wheel on the Kern cannot see astern. The Kern has no bridge. There are rooms immediately aft of the pilot house, but there appears in the photograph to be a raised portion where the usual strip of glass allows the man at the wheel to have a view aft. Moreover as to this portion of the appellee's contention if the Elder were a half a mile away, and this is the law of the case because the court below so found, all her lights would have been visible if she were exactly as Capt. Patterson testified, going to the starboard of the Kern, and she must have pointed to the starboard of the Kern because she came on a curving course when Patterson reversed.

The fears and doubts of Capt. Moran of the Kern made much of in the testimony and the briefs are not understood by the appellant to furnish any defense to the Kern or any excuse for its actions. If the owner of the Kern employed a captain who is subject to unusual fears, such as to prevent the passage of a passenger ship on its regular course without any excuse, is this, although put forward by the appellee as a defense or an excuse, available for that purpose? It seems to the appellant that the appellee is admitting its own wrong by making prominent the apprehension of Capt. Moran. If there had been a ground for Capt. Moran's apprehension, then his apprehension would be based on something, but apprehension without a reason offers no excuse in law nor under the rules and regu-

lations affecting the handling of ships. To offer nothing but Capt. Moran's apprehension of danger as an excuse for his action seems to be a pure confession of negligence on the part of the Kern. In other words, the blowing of a danger signal under any and all circumstances does not absolve the ship that blew the danger signal. The very fact that the danger signal was blown in this case caused the accident. If the danger signal had not been sounded there could not have been an accident. The excuse of the Kern is that Capt. Moran was apprehensive. The law requires the ground for the apprehension to be shown. Mere apprehension is not sufficient. It is in fact, hearsay. The court is entitled to decide whether the apprehension should have existed or not—the issue is not whether a captain were apprehensive or not or what his state of mind or body might have been,—the question is, were the facts such as to justify certain conditions? And the appellant therefore points to pages 36, 37 and 38 of the appellee's brief making prominent the apprehension of Capt. Moran as an effort which was successful in the court below of inducing the court below to grant the decree that was given whereby the law was misapplied and an error committed. In fact the entire case is again made clear by a statement on page 38 of appellee's brief as follows:

“For instance, if an overtaking steamer did not, without consent of the overtaken vessel,

approach within such distance but what she could stop before the vessel being overtaken is reached, the rules would be complied with and occasion for such presumption as we have been discussing would not arise.”

This is true. If there had been an overtaken vessel, if the Kern had been an overtaken vessel, if the Kern had been on a steady course as Patterson had to think she was because he could not see her sidelights, he would have stopped, that is, the Elder would have stopped long before the vessel being overtaken, that is, the Kern, would have been reached. If the Kern had been an overtaken vessel, if she had been on a steady course she would not have been reached by the Elder.

An issue was made by the appellee as to the effect of Capt. Moran’s ignorance of the regulations and on page 39 of appellee’s brief there is an indication that the appellant has nowhere suggested that the misunderstanding of Moran was contributory to the collision. It has seemed to the appellant that Moran’s failure to understand the rule and his explanation of his conduct in connection herewith carried its own argument, to such an extent that further explanation was not necessary. However, to go into this matter:—it is shown by the appellee that Moran saw the Elder coming. She was a half a mile away. Both her lights must have been visible, although she was pointing slightly to the starboard of the Kern. She was to pass to starboard. She signalled to pass to starboard



and she had a half mile to do it in. Moran heard the starboard passing signal. He saw the Elder. He says he saw she did not change her course. This, however, is an incident worthy of note because she was half a mile away and he could not tell nor could any other man tell to the exact inch and foot how she was pointing, as Moran claims he could tell. Nevertheless, Moran saw that the Elder was coming in his direction and instead of answering, as he should have answered, he thought and believed that the Elder was compelled to change her course on giving the passing signal, and before he answered. It is not in the nature of an abstract proposition. It was this fact, this misunderstanding on the part of Moran that caused him to sound the danger signal. If he had known the rule he would have sounded the passing signal in answer to the Elder's passing signal. In that event there would have been no accident. Moran thought that it was his business, he says, and his duty to watch the Elder change her course before he answered, whereas it was his duty to answer first and have the Elder change her course after he answered. It seems clear from a reading of the record and an understanding of the conditions that exist and the facts as testified to that if Moran had sounded the passing signal in answer to the Elder's passing signal there would have been no collision.

The appellee then again attempts to point out that under Article 24 the Elder is an overtaking

vessel. As stated hereinbefore, it must first be found that the Elder is an overtaking vessel before rule 24 can be applied.

The position of the appellee is that the Kern cannot be held at fault "for she can only be held in fault for a contributory act." Does not this apply to the Elder and not the Kern? It was the Kern that stopped the Elder. What contributory act did the Elder do that brought about this collision? The Elder tried to pass as usual in the ship's channel. It was dark, the ship channel was blocked and as far as Capt. Patterson was concerned on the Elder, the danger signal from the Kern must have indicated that the barges were adrift, for otherwise no excuse can be given by Capt. Moran for sounding the danger signal. The Elder reversed. It reversed as soon as possible. It sounded its first signal at the proper distance. It could do nothing more or less than try to stop headway. The conditions that brought about the collision were begun by the Kern and finished by the Kern. What contributory act did the Elder do? As far as the appellant can see the Elder did nothing that contributed to the accident.

Now let us see, in answer to the appellee's assertion, what was the contributory act of the Kern?

In the first place the Kern voluntarily chose the ship channel in which to maneuver the barges. Being in that position, its wheel lashed, adrift, with one line fast to the barges, it arbitrarily stopped the Elder on her regular course when she

had room to pass and certainly would have passed if she had not been stopped. Not satisfied with this, Capt. Moran puts the Kern full speed ahead and throws her crosswise in the current. It is even possible that the Elder would have missed the Kern completely if Capt. Moran had not sent the Kern ahead.

It is therefore submitted to the court that the law sought to be applied by the appellee when properly applied puts the Kern in fault and not the Elder.

The appellee's position is set forth again on page 53 of the brief on the general broad proposition that the Elder failed to keep out of the way of the Kern. As the Kern was drifting and fast by one line to three barges of three thousand tons of rock, it is somewhat hard to imagine how the Elder could have *kept out of her way, for she had no way*. She may have been under way in the matter of backing and filling, as some of the crew on the Kern testified, and the charge that the Elder "was in fault in not so checking her speed as to avoid overtaking the Kern until passing signals were properly exchanged" is a clear illustration of the erroneous holding of the court below and of the fallacious argument of the appellee, because the Elder could not overtake the Kern as the Kern was not on a course and there was no passing signal to be given from passing or pursuing to an overtaken or pursued vessel.

An opening is given to the appellant to point out to the court the appellant's contention by the fact that the appellee claims now that the Elder is to blame because she did not sound three whistles under the rules when she reversed.

These are the facts. The Elder reversed and did not sound three whistles. Why the pilot did not do this is explained by himself. However, why he did not is immaterial. The question is, did the fact that he did not sound three whistles have any bearing on the speed of the Elder or on the curve to port that she was necessarily making when she reversed? This cause appears before the court now with the appellee claiming that it can break the rules and have a pilot ignorant of the rules without being blameworthy, whereas the Elder must have been blameworthy in every respect of the case. It is submitted that the sounding of three whistles by the Elder would in no way have changed her course or have impeded her progress and there is no evidence that it would have had the slightest effect upon the Kern or have done anything to have avoided the collision. However, the libel is limited to the question of overtaking and overtaken vessels.

The appellee sets forth on page 60: "The point of it all is that the Elder was so navigated that, when the Kern answered her second passing whistle with the danger signal, she had gotten into such a position—so close to the Kern—she could not be stopped before striking the latter." This is pre-



cisely the case. Nevertheless the Elder is not blameworthy because the Elder was a half a mile away when she first signalled and it can be figured from the evidence that she was over a thousand feet away when she reversed and it was her curve to port on her left hand wheel that threw her into the Kern, all of which was due to the fact that Capt. Moran either wanted to stop the Elder on account of her waves or wash, which would have separated the barges, or else because he did not know the rules and thought the Elder had to change her course before she signalled to pass to starboard. It is a fact that the Elder could not be stopped before striking the Kern, but the question is, did the Kern bring this about or did the Elder bring it about, and the appellant submits to the court that it was brought about by the Kern and not by the Elder.

The appellee further contends that the Elder is in fault because the Elder did not break the rules. This is on page 62.

The position of a man on the bridge of the Elder can easily be imagined. A half a mile away is the Kern. It is natural to suppose that she is fast to the barges and that she will be passed as usual. Nevertheless she answers with a danger signal. This indicates the barges are separated or that the lights are out and that the Elder had better look out for its own safety. There is one thing to do and the Elder reversed as soon as the pilot knew the danger signal was being sounded.

The court below held that the Elder was free to go anyway she wanted. She might have been physically free to have gone anyway she wanted, but no one knowing what these rock barges are would take a chance of hitting one. She had one thing to do, that was to stop and see what was the matter, and in stopping as she was ordered to by Moran, she happened not to miss the Kern by sixteen feet.

The contention that the Elder was going at a high rate of speed when she struck the Kern not only cannot be proved, but cannot be shown by deductions of any kind. If the Elder had been going at any speed she would have cut the Kern in two without feeling it. She probably was barely moving when she reached the Kern. Her progress was probably imperceptible. A boat like the Kern would have offered no resistance to the bow of the Elder if the Elder had had any speed at all.

The appellee's contention is finally set forth on page 66 of its brief. It sets forth four points.

It is pointed out to the court that in not one of these points is a question made of the evidence. It is a question of law. Point (1) includes points (2) and (3). Point (1) excludes any other condition or theory than that the rule of an overtaking and an overtaken vessel shall apply. Point (2) is a generalization under point (1). Point (3) is a greater generalization under point (1) and in fact is the holding of the court below. The foregoing

are all necessarily based on the fact that the Elder did not break the rules as to signals and course.

Point (4), however, is based on the contention that the Elder did not break but should have broken the rules and followed another course.

On the other hand, the appellant contends as follows:

(1) That the burden of proof is on the libelant and appellee as usual, and that nothing has occurred to throw the burden on the appellant.

(2) No facts are proven by the Kern or by the libelant to explain the reason of Capt. Moran's giving the danger signal other than his ignorance of the regulations or his fear of the waves and wash from the Elder disturbing his attempt to make fast to the barges, neither of which is a justification. The Elder was on her course to starboard of the Kern and the barges and the accident would not have occurred excepting for the action of the Kern in stopping the Elder.

(3) The libelant voluntarily blocked the ship's channel when there was spacious room in which to have maneuvered these dangerous barges clear of the fairway.

(4) The Kern had no lookout.

(5) The Kern's wheel was lashed, her navigation was abandoned.

The appellant is seeking a reversal of the decree, awarding to the appellant his costs and disbursements incurred against the libelant.

Portland, Oregon, February 19, 1918.

Respectfully submitted,

SANDERSON REED,  
Proctor for Appellant.





No. 3073

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

---

CHARLES P. DOE, claimant of the steamship  
“George W. Elder”, her engines, etc.,  
*Appellant,*

vs.

COLUMBIA CONTRACT COMPANY (a corporation),  
and UNITED STATES FIDELITY AND GUARANTY  
COMPANY, stipulators,  
*Appellees.*

**REPLY OF APPELLEE, COLUMBIA CONTRACT COMPANY,  
to Appellant's Additional Memorandum of Authorities.**

---

EDWARD J. McCUTCHEN,  
IRA A. CAMPBELL,  
WOOD, MONTAGUE, HUNT & COOKINGHAM,  
McCUTCHEN, OLNEY & WILLARD,  
*Proctors for Appellee,  
Columbia Contract Company.*

FILED  
MAR 13 1912



No. 3073

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

CHARLES P. DOE, claimant of the steamship  
“George W. Elder”, her engines, etc.,

*Appellant,*

VS.

COLUMBIA CONTRACT COMPANY (a corporation),  
and UNITED STATES FIDELITY AND GUARANTY  
COMPANY, stipulators,

*Appellees.*

## REPLY OF APPELLEE, COLUMBIA CONTRACT COMPANY, to Appellant's Additional Memorandum of Authorities.

---

Upon the argument, appellant cited three cases, not referred to in his brief, in support of his present contention that the “Elder” was not an overtaking vessel. Since then appellant has filed a reply brief wherein he again refers to them. Because these additional authorities were not cited prior to the argument, we, on behalf of appellee, requested and were granted permission to file a reply memorandum.

Despite the temptation to make the obvious answers to the matter appearing in appellant's reply brief we



shall confine ourselves to the law applicable to the case. Although the same contentions were made in his opening brief, it is significant to note that the appellant has again failed to offer any excuse or justification for the "Elder's" reckless navigation.

In the first case cited by appellant,

*The John Rugge*, 234 Fed. 861,

the tug "Rugge" and her tow were claimed to be overtaken vessels despite the fact that the tug was rounding to for the purpose of straightening out on her course. As found by the court she was merely "winding around to get on her course," after leaving the wharf with her burdensome tow. There is not a word in the court's opinion which indicates that the colliding vessel, *The Perth Amboy*, was coming up with the "Rugge" or her tow from any direction more than two points abaft their beam, or that the crew of the approaching vessel were unable to see either of the side lights of the "Rugge." In fact, such a situation is practically impossible with respect to a tug such as the "Rugge", leaving a wharf and maneuvering around to get on her course, towing a barge and three other boats in tandem style, in the narrow waters of the Arthur Kiel. Obviously, in the maneuvers of the burdened tug, all of her lights, as well as the lights on the tow, would be constantly changing. In fact, in the lower court it was contended that the vessels were on crossing courses. The decision has no application to the facts of the present case.

Appellant next cites

*The Servia*, 149 U. S. 144,

to the point that there are conditions not covered by the rules. There the vessel in collision

“was backing out, stern foremost, from her berth in a slip in Jersey City.”

The court’s opinion upon the point to which it is cited by appellant is as follows (p. 686):

“The statutory steering and sailing rules before referred to have little application to a vessel backing out of a slip before taking her course, but the case is rather one of ‘special circumstances,’ under Rule or Article 24 requiring each vessel to watch, and be guided by, the movements of the other.”

Manifestly, the rule there announced is inapplicable to the facts of the present case.

The extremes to which appellant has gone in his unsuccessful efforts to have the “Elder” relieved from the effects of her reckless navigation is best evidenced by the next citation,

*The Transfer No. 19*, 194 Fed. 77,

a case so different from the present one that it hardly requires passing consideration. There the master of the tug “Gladiator,” intending to dock at a slip, while approaching it put her helm aport and her engines at full speed astern. Unfortunately, he miscalculated the tug’s headway and, as a result, she struck the pier so hard that he was thrown down, the wheel striking him and breaking both of his jaws, thereby rendering him unconscious. He remained in that state until after the collision which followed. In the meantime, the tug,

under a port helm, continued to go full speed astern, with no one in charge of her navigation, *in a semi-circle*, until the time of the collision. What possible support has such a decision upon appellant's contention that the "Kern" was not an overtaken vessel?

In not one of the cases cited\* does it appear that the lights or bearings of the vessel run down remained in any steady or fixed position for any appreciable period of time. Obviously, with a vessel backing out of the slip, or maneuvering around to get on her course, or backing in a semi-circle full speed astern, her lights and bearings will be constantly changing, hence the situation thus presented is one of special circumstances and each vessel should act prudently.

The rules of navigation were enacted to prevent collisions, not to induce them. They come into operation when the need of precaution begins. As said by Judge Brown in

*The Aurania*, 29 Fed. 98-105,

in discussing overtaking vessels:

"The rule applicable must depend upon the actual situation at the time when the necessity of precaution begins."

Applied to the facts of our case, it at once becomes apparent that the rule applicable is to be determined by the position in which the vessels were when the

\*Appellant also cited *The William A. Jamieson*, 241 Fed. 950, to show the necessity of a lookout. The books are full of similar cases where vessels have been condemned for the want of a lookout. There the "Jamieson" did not have a lookout forward, both deckhands being at the stern of the vessel. The court recognized the rule that she should not be condemned unless the absence of a lookout contributed to the collision. Finding that such fault did contribute, it held her in fault.

“Elder” blew her first whistle, requesting permission to pass to the starboard of the vessel her officers saw ahead. Just prior to that time the “Kern” had come to a stop, it is true, but she was out in the middle of the river, on the same course she had for some time previously been pursuing, coming down the river, pointing directly down stream, with neither of her side lights visible to the “Elder.” She came to a stop momentarily so as to make fast to the barges. In this respect her position is similar to a vessel, while on her course, momentarily stopping her engines and her headway without changing her bearings. She was not backing and filling at the time of the exchange of the first whistle, or any time thereafter, as stated by appellant.\* Jensen, the assistant engineer, testified that for some *few minutes before* they had received the first signal from the “Elder” they were “going ahead and backing.” But when the “Kern” reached the barges, which was prior to the time they received the “Elder’s” first whistle, he stopped the engine. (Ap. 241.)

Upon the visibility of the “Kern’s” side lights little need be added to what we said in the brief (pp. 12-15) previously filed. The admissions made in the lower court, forced out of appellant by the testimony introduced as well as the evidence of the physical damage suffered by the “Kern” cannot now be withdrawn. In fact, everybody in the lower court conceded that the

\* Appellant’s comments about the lashed wheel of the “Kern” bespeak an unfamiliarity with navigation. The lash is a mere line with a loop on one end which is usually placed around one of the spokes of the ship’s wheel. It is frequently used on all vessels when the wheel is kept at steady.



“Elder” was coming up with the “Kern” from a position directly astern more than two points abaft the latter’s beam, that is, in such a position, with reference to the “Kern” that *she was unable to see either of her side lights*. Even appellant’s present proctors, despite their criticism of the admissions made in the court below, find themselves unconsciously admitting the same fact. On page 3 of their brief they state the fact as follows:

“The Kern was lying up and down stream previous to the collision, *her side lights invisible to the Elder.*”

What did that indicate to Pilot Patterson? It indicated to him, as his action in blowing a one blast whistle under Rule 8 of Article 18 requesting permission to pass an *overtaken vessel* conclusively demonstrates, that the vessel ahead was pointing ahead in the same direction in which he was going—that he was “coming up with another vessel” from astern and that he was in such a position and coming from such a direction that he was “unable to see either of that vessel’s side lights.” He knew, and every other navigator similarly situated would know, that the “Kern” was an overtaken vessel. As said by Judge Brown, in

*The Aurania, supra,*

in discussing this general question:

“The terms used in the rules are, moreover, used in the nautical sense, and must be applied as seamen are wont to apply them.”

Pilot Patterson’s actions at the time he blew the first and second whistle speak more emphatically than can we of the rules governing the two vessels.

A collision arising under the International Rules of 1880, where the overtaken vessel was *at rest upon the water*, was presented to the Probate Division in

*The Imbro*, 14 P. 73.

There the "Poseidon" was lying *becalmed* off Dungeness. She was heading to the northward and westward, *without steerageway*. The "Imbro" was approaching, the navigating officer of the latter observing her lights, which he mistook for the lights of different vessels. Without taking any precautions to prevent a collision until he got so close that a collision was unavoidable, he approached and struck the vessel ahead lying motionless in the water. After condemning the "Imbro" for such conduct, which in the opinion of the court was "reckless and negligent navigation," it proceeded to ascertain whether the "Poseidon" was also in fault because of its failure to show to the "Imbro" the light required by Article 11 of the international regulations, in effect at the time of the collision, to be shown by *an overtaken vessel*. Before considering the alleged fault of the "Poseidon," however, the court deemed it material to determine what an overtaking vessel was. And despite the fact that the "Poseidon" was *not moving* through the water, the court found that she was *an overtaken vessel*, saying:

"In my opinion a vessel approaching another from aft, and being more than two points abaft the beam of the foremost ship—a position from which the coloured side lights of the foremost vessel would not be visible—is an overtaking vessel. \* \* \*"

The definition of an overtaking vessel so uniformly adopted by the courts\* is now embodied in Article 24 of the International and Inland Rules.

That article does not say, as appellant would have it read, that every vessel coming up with another vessel is an overtaking vessel provided the vessel ahead is actually running in the same direction. On the contrary, it plainly provides that:

“Every vessel coming up with another vessel  
\* \* \* in such a position with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel’s side lights, shall be deemed to be an overtaking vessel.”

Every vessel coming within that definition, and concededly the “Elder” does upon the testimony and admissions heretofore pointed out, is an overtaking vessel, regardless of the question as to whether the vessel being overtaken is running in the same direction, becalmed, stopped or merely under way within the meaning of the rules, in which latter situation we now proceed to place the “Kern.”

*The “Kern” Was Under Way.*

The navigation rules, as pointed out in our opening brief, provide that a vessel is under way within their meaning “when she is not at anchor or made fast to the shore or aground.”

Act of June 7, 1897, 30 Stat. 96.

Appellant, however, takes issue with us upon this question and in so doing takes the position that the

\*See *The Main*, 11 P. 132; *State of Alabama*, 17 Fed. 847; *The Aurania*, 29 Fed. 98.

“Kern” was *not under way*. We shall later show where such contention leads appellant, but for the present shall attempt to point out the fallacy of his argument.

The “Kern” was not at anchor, she was not made fast to the shore and she was not aground. Consequently she, within the meaning of the rules, was under way. The courts have so ruled in passing upon other vessels similarly situated. They could not do otherwise where a vessel comes, as does the “Kern,” directly within the mandatory provisions of the statute.

The court followed the plain language of the statute in

*The Nimrod*, 173 Fed. 520,

where it said:

“And a vessel, even though her headway is killed in the water, is considered under way, unless she is at anchor, or tied to the shore or aground.”

This court expressly recognized the application of the rules to a vessel situated somewhat similarly to the “Kern” in

*The Ruth*, 186 Fed. 87.

There it was contended that the “Ruth” was not under way, but that she was a vessel at rest as fully as if she had been at anchor. The court rejected the contention and held that as she was not at anchor or made fast to the shore or ground, she was a vessel “under way within” the meaning of the navigation rules.



In

*Hughes on Admiralty*, p. 216,

the author says:

“So, too, in order to avoid any possible misunderstanding, a vessel, even though her headway is killed in the water, is considered under way, unless she is at anchor, or tied to the shore, or aground. The reason is that, unless she is thus fastened to something, a turn of her engines may put her under way, and therefore she should be avoided.”

See also

*The Aurelia*, 183 Fed. 341.

Following appellant's contention one step further, it at once becomes apparent that he would have the “Kern” a vessel at rest and, although not at anchor, entitled to the rights of a vessel in that situation. The “Kern's” engine was stopped (Ap. 241) before and at the time when the “Elder” blew her first whistle, and so remained until a short period of time before the collision.\* She was, therefore, entitled to protection from a vessel approaching her at such a rapid rate of speed that when the approaching vessel reversed her engine, she was unable to stop before striking her with such force that she cut twelve feet into her to within ten inches of the center line of her main deck. The “Elder” saw her over half a mile away. The navigating officers of appellant's vessel, in the opinion of the court below,

\*Her movement then to avoid a collision was admitted to be and obviously was an act *in extremis*. (Ap. 228.)

“knew the river, and knew also that the ‘Kern’ was engaged in navigating barges down stream  
\* \* \* and

“knew that the ‘Kern’ and ‘Hercules’ were in the habit of exchanging tows in the river \* \* \* and ought to have known that the ‘Kern’ was likely to be engaged in the very thing that she was trying to do at the time.” (Ap. 60.)

Despite this knowledge, she continued negligently on her course without taking a single precaution to avoid the vessel ahead until it was too late to avoid a collision. Such reckless navigation cannot be successfully defended.

In

*The Col. John F. Gaynor*, 130 Fed. 856,

while the steamer was motionless waiting to pick up a quarantine physician, she was observed by those on board the tug at a time when the latter, approaching the steamer, was a considerable distance away. Nevertheless the tug so maneuvered her tow that it collided with the steamer. In holding the tug at fault, the court said:

“The steamship \* \* \* though not exactly in the situation of a ship at anchor, had to a large extent, the rights of a ship at rest, in regard to the movements of a passing vessel.”

The Circuit Court of Appeals for the Second Circuit in

*Britain S. S. Co. v. J. B. King Transp. Co.*, 131 Fed. 62,

likewise condemned an approaching vessel for colliding with a steamer not moving through the water, the court saying:

“The steamer was practically a vessel not under way, was seen to be such by the navigators of the tug, and *was so seen at a distance amply sufficient* to enable the latter to avoid collision. \* \* \* ”

Both of these decisions were cited with approval by this court in

*The Ruth, supra.*

In

*The Lucille*, 169 Fed. 719, the court said:

“The situation of a vessel at rest upon the water, but not anchored, is analogous to that of a vessel at anchor or moored, and the duty of avoiding it is wholly upon the vessel in motion. Spencer on Marine Collisions, Secs. 116, 117, 120, and numerous authorities cited on page 257.”

The “Kern,” under these authorities, was entitled to the rights and privileges of a vessel at anchor. In view of the admitted fact that the pilot and officers of the “Elder” knew of the presence of the “Kern” when at a considerable distance away, it was their duty, even upon this theory, to take proper precautions to avoid the “Kern.” They failed in this duty with the result that the “Elder” crashed into her and thus caused her to sink immediately.

Upon such a state of facts, we submit, the elementary rule, so frequently announced, that a moving vessel must avoid one at anchor, is applicable and that she is liable for all injuries caused by a collision which might have been avoided by the exercise on her part of due care and precaution. Having collided with a vessel entitled to the privileges of one at anchor, the

burden of proof, upon familiar principles, is upon her to show that she was free from fault.\* The same burden, as we pointed out in our reply brief, also rests upon her as an overtaking vessel. She has not sustained the burden. In fact, appellant has not offered an excuse for his vessel's reckless navigation. The reason is apparent; such navigation cannot be successfully defended. The collision could have been avoided if the "Elder" had exercised ordinary care, or if she had taken the proper or any precautions to avoid the "Kern." Her failure so to do was the sole cause of the collision. Consequently, the decree of the lower court should be affirmed in all respects with the directions previously requested in our former brief.

Dated, San Francisco,

March 6, 1918.

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

WOOD, MONTAGUE, HUNT & COOKINGHAM,

McCUTCHEN, OLNEY & WILLARD,

*Proctors for Appellee,*

*Columbia Contract Company.*

\**The Clara Clarita*, 23 Wall. 1; 23 L. ed. 146-9;  
*The Virginia Ehrman*, 97 U. S. 309; 24 L. ed. 890;  
*The Lucille*, 169 Fed. 719.





In the United States  
Circuit Court of Appeals  
for the Ninth Circuit

---

CHARLES P. DOE, Claimant of the Steamship  
"GEORGE W. ELDER," Her Engines, etc.

*Appellant*

VS.

COLUMBIA CONTRACT COMPANY, a Corporation, and  
UNITED STATES FIDELITY AND GUARANTY  
COMPANY, Stipulators

*Appellees*

---

Petition for a Rehearing

---

**SANDERSON REED**

PROCTOR FOR THE PETITIONER

FILED

DEC 25 1911



**In the United States  
Circuit Court of Appeals  
for the Ninth Circuit**

---

CHARLES P. DOE, Claimant of the Steamship  
"GEORGE W. ELDER," Her Engines, etc.  
*Appellant*

VS.

COLUMBIA CONTRACT COMPANY, a Corporation, and  
UNITED STATES FIDELITY AND GUARANTY  
COMPANY, Stipulators  
*Appellees*

---

**Petition for a Rehearing**

---

To the Honorable Wm. B. Gilbert, Wm. W. Morrow,  
Wm. H. Hunt, Judges of the above entitled  
court:

The appellant, on reading the opinion of this honorable court, prays for a rehearing, the grounds being specifically stated in this petition, but also generally on the ground that there seems yet to exist in the mind of the court a conception of the issues of fact and the law applicable thereto, misleading the court in the rendering of the decision.

On reading the opinion of this honorable court it would appear therefrom that the contention of



the appellant has been sustained, and yet the decree rendered in favor of the respondent.

The opinion herein up to a certain point reads as follows, to-wit:

“Gilbert, Circuit Judge, after stating the case:

It seems clear that the Kern was at fault in the first instance in not signaling her consent to the first passing signal of the Elder. The Kern and her tow lay in the channel way and at least 1,000 feet from the Washington shore. There was ample room for the Elder to pass to starboard without danger to the Kern or her tow. The only reason which Moran, the pilot of the Kern, assigned for answering with the danger signal was that the Elder was headed directly for him, and that there was going to be a collision, and that he could see no evidence that the Elder had started to turn to starboard. He did not think that it was unsafe for her to come farther on her course. Moran, it appeared, was laboring under a misapprehension of the rule, and he thought that the law required the Elder to accompany her whistle by an alteration of her helm, so that the Kern could see what she was doing. The fault of the Kern was a grave one. But for her pilot's refusal to assent to the passing signal, the Elder would undoubtedly have passed to starboard, and a collision would have been avoided.”

Here the court plainly and succinctly states that the Kern caused the disaster primarily. There

could be no findings, no conclusion or announcement by a court in its opinion more clear or unequivocal, and this was never found by the court below and if it had been found by the court below, we believe the court below would have given a decree in favor of the Elder. The opinion of this honorable court shows that the first move tending toward the disaster was that of the Kern.

The opinion then says:

“But we are not convinced that the court below erred in holding that the proximate cause of the collision was the fault in navigation of the Elder and that the fault of the Kern was not a contributing cause.”

The question arises, how could the acts of the Kern under the facts, be anything but the contributing cause of the disaster? And it is to undertake to convince the court on this point that this petition is filed.

The opinion of this honorable court then says:

“It was the Elder’s duty, on hearing the first danger signal, to proceed no further in the attempt to pass.”

Is this a correct and proper statement under the circumstances? Does this statement not assume the existence of non-existent conditions and assume a state of facts not included in the evidence or the findings? Is it the holding of the court that the “Elder” “proceeded further in the attempt to pass”? Is not the contrary the fact?

The appellant is not aware that anywhere in the record is it shown or claimed that the Elder undertook to proceed in an attempt to pass. It is the appellant's understanding that Capt. Patterson undertook to stop headway as soon as he was able to comprehend the Kern's intentions. It is the appellant's understanding of the record that the pilot on the Elder, Capt. Patterson, heard the four signals, and not more than four, and knowing that the barges and the Kern were ahead and knowing that the four signals might be a quickly repeated signal to pass to port, he said, "For God's sake what were those fellows trying to do?" (Apostles, pg. 341.) and then repeated his signal to pass to starboard.

Let us stop here for a moment. Capt. Patterson heard signals from the Kern. The signals were confusing; there was no explanation for them. The court has found this fact in its opinion herein. This court has said in effect that the act of the Kern in sounding that signal, brought on the disaster, or, to be more specific if the Kern has not sounded that signal, there would have been no disaster. If it were a danger signal, Capt. Patterson dared not pass, but the danger was not visible or within his means of understanding, and as a matter of fact, there was no danger, which is the reason this honorable court decides that the Kern was to blame in that respect.

It is now submitted that the same reasons that caused the court to say that the disaster would not

have occurred except for the Kern blowing the signal, make the blowing of the second danger signal occupy the same position the law and make the blowing of the second danger signal the proximate cause of the disaster.

If the Kern had answered the second signal of the Elder as the Kern should have, there likewise would have been no disaster.

If the blowing of the first signal by the Kern makes the Kern blameworthy, the blowing of the second signal, it seems to the appellant, fastens the entire blame on the Kern.

Article 17, Rule III, of the Pilot Rules for Inland Waters, is as follows:

“If, when steam-vessels are approaching each other, either vessel fails to understand the course or intention of the other from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle.”

This is the danger signal, so to speak. Moran, being in error, called upon the Elder by four whistles to declare herself, and Capt. Patterson, knowing the rules, answered with a signal to pass to starboard. His actions were perfect, as to both the rules and the conditions surrounding, and it was then again that Moran sounded the danger signal and the appellant contends and submits to the court that the action of Moran and the Kern in sounding



the second danger signal was the proximate cause of the disaster. Moran had no excuse for sounding the danger signal or the four blasts under Rule III., Art. 17, the second time. He should not be allowed to come into court and say he did not understand. It was his business to understand, and it was his confessed lack of understanding that caused him to blow the danger signal in the first place and his lack of understanding that caused him to blow the danger signal in the second place.

Now, if he was guilty the first time, why should he be absolved the second time? Why should the blame be thrown on the Elder?

And the appellant wishes to point out to the court that should a rehearing be granted, the appellant will be able to show that the Elder reversed within a period of time that was hardly appreciable, if the testimony of Moran, the Kern's pilot, can be relied upon.

The opinion further says:

“By the rules of navigation the pilot of the Kern was made the judge of the necessity for giving the danger signal.”

The appellant submits, however, that he is not the judge in the sense that his actions can be arbitrary. The appellant does not understand the law to be that the pilot of the Kern had legal authority to interfere with the progress of the Elder down the river without reason or excuse.

The petitioner herein sets this forth as a ground for a rehearing.

The court further says a duty was imposed upon the Elder

“under no circumstances to attempt to pass at that point or until the Kern signified her consent.”

and the petitioner respectfully follows another, or different legal rule from this, because under Rule VIII, and under the decisions, the vessel ahead “shall signify her willingness by blowing the proper signal,” at such time “where it can be safely done.” In other words, the petitioner begs to point out to the court that the court’s holding, as indicated in the opinion, that the Kern was empowered by the law to give or withhold her consent to the Elder passing, is not well founded. The petitioner believes that the law is that the Kern is not allowed to be arbitrary or give the danger signal or the four blasts indicating a lack of understanding or do anything else to hold up a passenger ship unless the Kern gives the proper reason therefor. The court has found in this cause specifically **THAT THERE WAS NO REASON FOR THE KERN’S ACTION IN GIVING THE FOUR BLASTS.**

In addition to this and under the conditions above pointed out, the appellant refers the court to Article 27:

“In obeying and construing these rules due regard shall be had to all dangers of naviga-

tion and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.”

The rules and the law refer the court to any special circumstances which may render a departure from the rules necessary in order to avoid immediate danger.

Now, could there be a case in which special circumstances are more prominent than in this one?

The court in its decision says that the Elder is to blame.

The court does not specifically declare what the Elder's negligence is, but by inference says that it was the Elder's duty to stop, and this is what the appellant claims was done as soon as the Elder could know what was happening.

Article 27 provides for such a case as this.

The special circumstances in the cause at bar are the fact that the Kern was exchanging rock barges in the ships' channel and the pilot on the Elder was justified in demanding an absolutely clear signal from the Kern before taking action. Inasmuch as the Elder was on a course to the starboard of the Kern and perfectly safe to pass the Kern and as the pilot on the Elder knew this, when the pilot on the Elder received the misleading and erroneous danger signal consisting of four blasts, when it might have been five or over, the pilot on the Elder did not know whether he was to stop or

to go to the port of the Kern, and he immediately called for a further assurance from the Kern.

It seems to the appellant that under the rules every equity is with the Elder.

The court further says:

“At that time and for some appreciable time thereafter it was obviously possible for the Elder to keep clear of the Kern, as it was her duty to do.”

It is true a duty was imposed on the Elder and her duty was to keep clear of the Kern, but if the Elder was induced to do something by the Kern which brought her upon the Kern, is the law to charge the damages to the Elder or to the Kern? The appellant wishes to show to the court that the foregoing sentence or paragraph, when connected with the first paragraph of the court's decision above copied, makes the action of the Kern the proximate cause of the disaster. For instance,—

“But for her (the Kern's) pilot's refusal to assent to the passing signal, the Elder would undoubtedly have passed to starboard and the collision would have been avoided. At that time and for some appreciable time thereafter it was obviously possible for the Elder to keep clear of the Kern, as it was her duty to do.”

Does not this entitle the appellant to the decree? If the action of the Kern in her signals were such as to confuse the Elder to the point of inability to help herself, when the pilot followed the rules in



all respects, can it be said that the Elder was to blame?

Otherwise, in what respect are the specific rules for rivers and inland waters of value? If a pilot follows the rules and is misled by another pilot, who does not follow the rules, which is to blame?

In presenting this petition for a rehearing it is with the idea that a further argument on the law and an elucidation of the issues would bring the court to a realization of the accuracy of the appellant's contention, whereby an injustice would be remedied.

Portland, Oregon, April 20, 1918.

Respectfully submitted,

SANDERSON REED,  
Proctor for Claimant.

State of Oregon,

County of Multnomah—ss.

I, Sanderson Reed, proctor for appellant and petitioner, hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

SANDERSON REED,  
Proctor for the Petitioner.

No. 3073

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

CHARLES P. DOE, claimant of the steamship  
"George W. Elder", her engines, etc.,  
*Appellant,*

vs.

COLUMBIA CONTRACT COMPANY (a corporation),  
and UNITED STATES FIDELITY AND GUARANTY  
COMPANY, stipulators,  
*Appellees.*

**PETITION OF APPELLEE,**  
**Columbia Contract Company, for Modification of Opinion.**

EDWARD J. McCUTCHEN,  
WOOD, MONTAGUE, HUNT & COOKINGHAM,  
McCUTCHEN, OLNEY & WILLARD,  
Merchants Exchange Building  
*Proctors for Appellee and Petitioner,*  
*Columbia Contract Company.*



No. 3073

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

CHARLES P. DOE, claimant of the steamship  
“George W. Elder”, her engines, etc.,  
*Appellant,*

vs.

COLUMBIA CONTRACT COMPANY (a corporation),  
and UNITED STATES FIDELITY AND GUARANTY  
COMPANY, stipulators,  
*Appellees.*

---

## PETITION OF APPELLEE,

**Columbia Contract Company, for Modification of Opinion.**

---

*To the Honorable William B. Gilbert, Presiding Judge,  
and the Associate Judges of the United States  
Circuit Court of Appeals for the Ninth Circuit:*

The Columbia Contract Company, appellee herein, respectfully requests a modification of the opinion entered by this court herein on the 1st day of April, 1918.

On pages 64 and 65 of the brief for appellee we called attention to the fact that although appellee's



damages were assessed at the sum of \$41,839.83, a decree against the stipulator on the bond given for the release of appellant's vessel was entered in the sum of \$25,000 (Ap. 637). The decree of the lower court also imposes a liability upon appellant in the sum of \$9,991.65 on account of interest on the said sum of \$25,000 from May 1, 1910, to the date of the decree, and further imposes a judgment for costs incurred in the lower court against appellant. As the decree, upon familiar principles, could not provide for a judgment against the stipulator on the release bond in an amount in excess of its terms, and as the sureties on the cost bond in the court below are not liable for any amount in excess of their contract liability (\$250) and as the costs below in fact exceeded that sum, the appellee is without security for the judgment for interest and costs entered in its favor in the court below, and now affirmed by this court, unless it has recourse to the appeal bond.

It is for that reason that we, in our brief, requested this court to specifically direct the lower court to enter judgment for costs and interest against the Fidelity & Deposit Company of Maryland, the stipulator on the appeal bond.

By what we cannot but feel is simply an oversight, the opinion of this court is wholly silent upon the question and we, again, by this petition, respectfully request the court's consideration of it.

The authority for our request is found in

*The Wanata*, 95 U. S. 600; 24 L. ed. 461.

In that case damages were awarded in the sum of

\$16,000, which was precisely the amount of the stipulation for value. The decree of the lower court, however, did not provide for interests or costs against the stipulators on the bonds in that court. An appeal was taken to the Circuit Court, and an appeal bond in the sum of \$2000 given. In the latter court a decree was entered against the stipulators for value in the sum of \$16,000, and against the stipulator on the appeal bond in the sum of \$1407.47, which latter sum covered the costs taxed in the District Court as well as interest on the sum recovered in the latter court to the date of the decree of the Circuit Court. An appeal was then taken to the Supreme Court of the United States and that portion of the Circuit Court's decree specifically assigned as error. The Supreme Court affirmed the judgment of the Circuit Court, saying:

“Where the claimant appeals from the decree of the District Court, the bond and other stipulations follow the cause into the Circuit Court; and, upon the affirmation of the decree, *the fruits of the appeal bond and other stipulations may be obtained in the same manner as in the court below*, they being in fact nothing more than a security taken to enforce the original decree, and are in the nature of a stipulation in the admiralty.”

(Italics ours.)

See also

*The Southwark*, 129 Fed. 171.

The appeal bond given in this case by the Fidelity & Deposit Company provides that it

“will abide by and perform whatever decree may be rendered by the Appellate Court in the cause, or on the mandate of the Appellate Court by the court below \* \* \*.”

We respectfully submit, therefore, that, under its very terms, appellee is entitled to look to that bond to satisfy its judgment for interest and costs heretofore entered by the District Court, and now affirmed by this court. It may be that the court below upon the filing of the mandate may have authority to direct the payment of costs and interest out of the appeal bond, but to foreclose any possibility of a contrary contention, on the part of the appellant, and in view of the unquestioned propriety of such an order by this court, under the authorities, we respectfully ask that this court in its mandate direct the lower court to enter judgment for costs and interest against appellant and his stipulator on the appeal bond, the Fidelity & Deposit Company of Maryland.

Dated, San Francisco,

May 1, 1918.

EDWARD J. McCUTCHEN,

WOOD, MONTAGUE, HUNT & COOKINGHAM,

McCUTCHEN, OLNEY & WILLARD,

*Proctors for Appellee and Petitioner,  
Columbia Contract Company.*

United States  
Circuit Court of Appeals <sup>7</sup>  
For the Ninth Circuit.

---

SUNSET TELEPHONE AND TELEGRAPH  
COMPANY, a Corporation,  
Plaintiff in Error,  
vs.

J. A. HOSHOR and EDNA R. HOSHOR, Husband  
and Wife,  
Defendants in Error.

---

Transcript of Record.

---

Upon Writ of Error to the United States District Court for  
the Western District of Washington,  
Southern Division.

---

FILED

NOV 30 1917

F. D. MONCKTON,  
CLERK.





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

SUNSET TELEPHONE AND TELEGRAPH  
COMPANY, a Corporation,  
Plaintiff in Error,  
vs.  
J. A. HOSHOR and EDNA R. HOSHOR, Husband  
and Wife,  
Defendants in Error.

---

Transcript of Record.

---

Upon Writ of Error to the United States District Court for  
the Western District of Washington,  
Southern Division.

---



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amended Complaint .....	3
Answer to Amended Complaint .....	9
Assignment of Errors.....	49
Attorneys, Names and Addresses of.....	1
Bond on Writ of Error.....	52
Certificate of Clerk of United States District Court to Original Exhibits .....	44
Certificate of Clerk of United States District Court to Transcript of Record.....	57
Certificate of District Judge to Bill of Excep- tions, etc. ....	43
Citation on Writ of Error (Copy).....	56
Citation on Writ of Error (Original).....	61
Empanelment of the Jury .....	9
EXHIBITS:	
Plaintiff's Exhibit No. 2—Photograph....	46
Defendant's Exhibit "A"—Pole Record of City of Tacoma .....	48
Instructions .....	35
Journal Order Extending Term .....	18
Judgment .....	13
Motion for Directed Verdict.....	33
Names and Addresses of Attorneys.....	1
Order Allowing Writ of Error.....	54



Index.	Page
'Order Concerning Transmission of Original Exhibits to Circuit Court of Appeals.....	18
Order Denying Motion for New Trial.....	13
Order Directing Original Exhibits Instead of Copies Forwarded Circuit Court of Appeals	16
Order Extending Term .....	19
Order Extending Time to and Including September 5, 1917, to Prepare and Serve Bill of Exceptions .....	19
Order for Removal to the United States District Court .....	8
Petition for New Trial .....	10
Petition for Writ of Error .....	49
Praecipe for Transcript of Record.....	1
Statement of Facts and Bill of Exceptions.....	20
Stipulation Re Bill of Exceptions and Statement of Facts, etc. ....	42
Stipulation Regarding Original Exhibits.....	17
Stipulation Regarding Transcript of Record..	15
Stipulation to Forward Original Exhibits to Circuit Court of Appeals .....	16
TESTIMONY ON BEHALF OF PLAINTIFFS:	
COVER, L. C. ....	26
DUNTON, EDWARD MILES .....	24
GRAHAM, EMMA E. ....	25
HOSHOR, EDNA R. ....	20
HOSHOR, J. A. ....	21
In Rebuttal .....	32

Index.

Page

TESTIMONY ON BEHALF OF DEFEND-  
ANT:

COLLINS, B. W. ....	31
DUNPHY, JAMES P. ....	27
HOSHOR, J. A. (In rebuttal).....	32
PETERSON, S. V. ....	29
PERKINS, E. E. ....	32
RICHARDS, FRANK ....	30
TAYLOR, A. B. ....	29
TAYLOR, MORTON L. ....	26
YOCOM, Dr. JAMES R. ....	32
Verdict .....	10
Writ of Error (Copy) .....	55
Writ of Error (Original) .....	59



**Names and Addresses of Attorneys.**

CHARLES O. BATES, Esquire, National Realty  
Building, Tacoma, Washington,

CHARLES T. PETERSON, Esquire, National  
Realty Building, Tacoma, Washington,  
Attorneys for Plaintiff in Error.

M. J. GORDON, Esquire, National Realty Building,  
Tacoma, Washington,

J. H. EASTERDAY, Esquire, National Realty  
Building, Tacoma, Washington,  
Attorneys for Defendants in Error. [1\*]

---

*In the District Court of the United States for the  
Western District of Washington, Southern Di-  
vision.*

No. 1752.

J. A. HOSHOR and EDNA R. HOSHOR, Husband  
and Wife,

Plaintiffs,

vs.

SUNSET TELEPHONE AND TELEGRAPH COM-  
PANY, a Corporation,

Defendant.

**Praeipice for Transcript of Record.**

To the Clerk of the Above-named Court:

You will please prepare and certify, to constitute  
the record on appeal of the above-entitled cause,

---

\*Page-number appearing at foot of page of original certified Transcript  
of Record.



## 2 *Sunset Telephone and Telegraph Company*

typewritten copies of the following papers, omitting all captions, excepting the caption to the amended complaint, omitting all verifications, acceptances of service, file-marks and other endorsements, said transcript of record to be certified and forwarded to and filed in the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, to be printed there according to the rules of said Circuit Court of Appeals:

1. This praecipe.
2. Amended complaint.
3. Order of removal from State court.
4. Answer of defendant to amended complaint.
5. Impaneling of the jury.
6. Verdict of the jury.
7. Petition for new trial.
8. Order denying petition for new trial.
9. Judgment.
10. Stipulation as to the record.
11. Stipulation to forward original exhibits to Circuit Court of Appeals.
12. Order to forward original exhibits to Circuit Court of Appeals.
13. All orders extending the term and extending time.
14. Bill of exceptions. [2]
15. Petition for writ of error.
16. Assignment of errors.
17. Bond and approval.
18. Order allowing writ of error.
19. The writ of error.

20. Citation in error.

21. Clerk's certificate.

CHARLES O. BATES,  
CHARLES T. PETERSON,  
Attorneys for Defendant.

Dated October 2d, A. D. 1917.

(Filed October 8, 1917.) [3]

---

*In the Superior Court of the State of Washington,  
in and for Pierce County.*

No. 1752.

J. A. HOSHOR and EDNA R. HOSHOR, Husband  
and Wife,

Plaintiffs,

vs.

SUNSET TELEPHONE AND TELEGRAPH  
COMPANY, a Corporation,

Defendant.

**Amended Complaint.**

Plaintiffs complaining of the above-named defendant, respectfully allege and show to the Court:

I.

That at all the times hereinafter mentioned, J. A. Hoshor and Edna R. Hoshor, plaintiffs above named, were and still are husband and wife.

II.

That at all the times hereinafter mentioned defendant Sunset Telephone and Telegraph Company was a corporation organized and existing under and by virtue of the laws of the State of California, and owning and operating various telephone and tele-

#### 4 *Sunset Telephone and Telegraph Company*

graph lines in the State of Washington, and doing business in the State of Washington conformably to the laws thereof pertaining to foreign corporations doing business therein, and having offices and agents for the transaction of its business at and in the city of Tacoma, in Pierce County, Washington. [4]

#### III.

That Sixth Avenue in the city of Tacoma, Pierce County, State of Washington, is and at all the times hereinafter mentioned was a public highway and at the point and place hereinafter mentioned was an open and generally travelled street and highway of and in said city.

#### IV.

That at a point or place on said Sixth Avenue opposite or nearly opposite the garage of the Hotel Hesperides in the vicinity of Titlow Beach near the west end of said street and avenue, the defendant on or about the 18th day of September, 1913, and for upwards of one year prior thereto had and maintained a pole erected for the purpose of carrying and holding two electric wires of the city of Tacoma, which wires were a part of said city's lighting system, and also for the purpose of holding, carrying and maintaining eight wires of defendant Sunset Telephone & Telegraph Company, which last-named wires were a part of said defendant Sunset Telephone & Telegraph Company's telephone and telegraph system.

That said pole was so erected and maintained under and pursuant to some arrangement or agreement between the defendant and said city, the exact

nature of which is unknown to plaintiffs.

That said pole was about forty (40) feet in height above the ground and imbedded in the ground some four or five feet. That from a point near the top thereof was attached a guy wire so-called, composed in part of wires some three-eighths of an inch in diameter, and also of an iron rod or bar some ten (10) feet in length and one (1) inch in diameter, to the ends of which said wires were fastened or attached, so that said rod formed a part of such guy wire; and the other, or ground end of said guy wire was anchored [5] or tied to a stump situated on the opposite side of said street or avenue from said pole, so that said guy wire and rod herein mentioned extended over and across said Sixth Avenue aforesaid, and pedestrians and others travelling said street and avenue at said point were required to pass or go under the same; the purpose of said guy wire being to hold and sustain said pole in an upright position.

## V.

That in the exercise of due and ordinary care it was and became the duty of the defendant to properly and firmly fasten and secure said guy wire at the ground end thereof, and thereafter to cause the same to be seasonably inspected for the purpose of determining that the same was securely fastened and was firm and secure in its position, nevertheless, so it is, that the defendant suffered and permitted said guy wire to be loosely and insecurely fastened or tied to the stump in the preceding paragraph hereof mentioned, and so loosely and insecurely fastened as



## 6 *Sunset Telephone and Telegraph Company*

that the weight of said wire and the attending jar caused and produced by traffic upon said street and avenue, caused the same to become unloosened and unfastened on or about the 18th day of September, 1913, and at a time when plaintiff Edna R. Hoshor, lawfully travelling along said street and avenue, was passing thereunder, and as a result of said guy wire becoming unfastened and detached from the stump hereinbefore referred to, said guy wire and the iron bar in part composing it, fell with a great force upon the plaintiff, Edna R. Hoshor, knocking her to the ground and severely and seriously injuring her as hereinafter more particularly stated.

### VI.

That as a result of the guy wire falling upon and against said plaintiff, Edna R. Hoshor, as mentioned and set forth [6] in the preceding paragraph hereof, she was made sick, sore and lame and disabled as follows, namely: she was struck by said guy wire and rod across her back and shoulders, knocked violently down, striking her head upon the ground with great force, as a consequence of which she was rendered unconscious for a brief interval; she was bruised and injured in the region of the left scapula and in the small of her back and upon her head and arms, and her nervous system was shocked and deranged. That in consequence of said injuries she was necessarily confined to her bed for a period of approximately five weeks; the shock and injury caused and produced impaired monthly periods and irregular menstruation, followed by extreme nervousness, emaciation and falling off in weight; also a

permanent weakness of the genital and interior organs of her body. That her injuries are permanent and in consequence of the same she will be permanently disabled and prevented from performing her customary work as housekeeper and housewife, and as a further consequence thereof she has become and will remain disabled to bear children, and the natural period of her life has been shortened and abridged. That by reason of said injuries she was caused to suffer great physical pain and mental anguish and will continue to suffer therefrom for an indefinite period hereafter.

That as a further result of said injuries plaintiffs were obliged to employ physicians, surgeons and nurses for the care and attention of the plaintiff, Edna R. Hoshor, at a reasonable cost and expenditure of Three Hundred Dollars (\$300.00), and will be obliged to incur additional cost and expense of like kind and character in the future, the extent of which cannot at this time be definitely stated, all to plaintiffs' damage in the sum of Ten Thousand Dollars (\$10,000).

WHEREFORE, plaintiffs demand judgment against the [7] defendant in the sum of Ten Thousand Dollars (\$10,000.00), besides the costs and disbursements of this action.

GORDON & EASTERDAY and  
A. H. GARRETSON,

Attorneys for Plaintiffs.

(Filed February 11, 1915.) [8]

**Order for Removal to the United States District Court.**

Now, on this 9th day of January, A. D. 1915, this cause came on for hearing upon the application of the defendant herein for an order transferring this cause to the United States District Court for the Western District of Washington, Southern Division, the plaintiffs appearing by Gordon & Easterday, their attorneys, and the defendants appearing by Bates, Peer & Peterson, its attorneys, and it appearing to the Court that the defendant has filed its petition for such removal in due form of law, and that the defendant has filed its bond duly conditioned, with good and sufficient surety, as provided by law, and it further appearing to the Court that notice of the filing of said petition and bond was duly given to the above-named plaintiffs before the filing of the same, and that this is a proper cause for removal to said District Court,—

IT IS THEREFORE BY THE COURT ORDERED AND ADJUDGED that this cause be, and it is hereby removed to the United States District Court for the Western District of Washington, Southern Division, and the clerk is hereby directed to make up the record in said cause for transmission to said Court.

C. M. EASTERDAY,  
Judge.

(Filed February 6, 1915.)    [9]

**Answer to Amended Complaint.**

Comes now the above-named defendant, and for answer to the amended complaint herein,—

**I.**

Admits the allegations contained in the first, second and third paragraphs of said complaint.

**II.**

Denies each and every allegation contained in the fourth paragraph of said complaint.

**III.**

Denies each and every allegation contained in the fifth paragraph of said complaint.

**IV.**

Denies each and every allegation contained in the sixth paragraph of said complaint.

**V.**

Denies each and every allegation contained in the seventh paragraph of said complaint.

WHEREFORE, this defendant having fully answered said amended complaint prays that this action may be dismissed, and that it may recover its costs.

**BATES, PEER & PETERSON,**

Attorneys for Defendant,

Office and Postoffice Address, 1107 Nat'l Realty  
Building, Tacoma, Washington.

(Filed March 15, 1915.) [10]

---

**Empanellment of the Jury.**

At a regular session of the United States District Court for the Western District of Washington,



## 10 *Sunset Telephone and Telegraph Company*

Southern Division, held at Tacoma on the 26th day of June, 1917, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said court, to wit:

This cause coming on regularly at this time for trial, the plaintiffs appearing by their attorney M. J. Gordon, and the defendant being represented by C. O. Bates, and Chas. T. Peterson, a jury being ordered, the following named persons answered to their names, and were duly sworn, examined and empanelled as the jury in this cause:

S. D. Simons.	Robert Weisbach.
I. A. Johnson.	C. S. Blair.
Charles Baumbach.	E. A. Nichols.
A. E. Green.	Frank E. Bender.
A. M. Goddard.	E. M. Thomas.
J. C. Sudderth.	G. M. Gunderson. [11]

### **Verdict.**

We, the jury empanelled in the above-entitled cause, find for the plaintiffs and assess their damages at the sum of Thirty-seven Hundred Fifty Dollars (\$3750.00).

A. M. GODDARD,  
Foreman.

(Filed June 28, 1917.) [12]

---

### **Petition for New Trial.**

Comes now defendant, Sunset Telephone and Telegraph Company, and petitions the Court to grant a

new trial herein for the following causes materially affecting the substantial rights of the defendant:

I.

The jury awarded plaintiff excessive damages, the same appearing to have been given under the influence of passion or prejudice.

II.

Insufficiency of the evidence to justify the verdict of the jury.

The evidence is wholly insufficient to show that the pole line in question was an agency or instrumentality in the possession of or under the control of defendant.

The evidence is wholly insufficient to show that there was any duty on the part of defendant to make any inspection, or to exercise any care in the maintenance of the guy line in question, the falling of which it is claimed caused the injuries.

The evidence is wholly insufficient to show that the manner in which the guy line was attached to the cedar stump referred to in the complaint and in the testimony, was not a proper or safe means of securing the same.

The evidence was wholly insufficient to show that if there was any defect in the manner of fastening the guy wire to the stump that a reasonable inspection would have disclosed such defect.

The evidence is wholly insufficient to show that the defendant [13] exercised control, or had any right to exercise control over the guy line in question, the falling of which it is claimed caused plaintiff's injuries.

## 12 *Sunset Telephone and Telegraph Company*

The evidence is wholly insufficient to show the violation or neglect on the part of defendant of any legal duty toward plaintiff.

The evidence was wholly insufficient on plaintiff's theory of the case, or under any theory of law, to submit the question of defendant's negligence to the jury, or to support the verdict against defendant.

### III.

Error in law occurring at the trial, which error was duly excepted to at the time.

The Court erred in failing and refusing to rule, as a matter of law, that under the evidence defendant was a mere licensee in the use of the pole line and guy wire in question, and that it did not have any control over the same, and that defendant was under no legal duty to inspect the same, or keep the same in repair.

The Court erred in ruling under the evidence that it was defendant's duty to keep said guy line in repair, and erred in ruling that it was defendant's duty to inspect the same for the purpose of discovering defects therein, for the reason that the testimony affirmatively showed that the guy line in question was an instrumentality possessed and controlled exclusively by the city of Tacoma.

The Court erred in refusing to grant defendant's motion for a directed verdict, and for a dismissal of plaintiffs' action, made at the close of all of the testimony.

The Court erred in submitting the question of defendant's negligence under the evidence to the jury.

The Court erred in charging the jury wherein it instructed the jury that even though the wires of defendant were on a pole owned by the city of Tacoma, that it was the duty of defendant to exercise ordinary care to keep the guy wire supporting such pole in repair, and that it was the duty of defendant to make reasonable inspection of such pole and guy wire, which charge was duly excepted to by defendant at the time.

CHARLES O. BATES,  
CHARLES T. PETERSON,  
Attorneys for Defendant.

(Filed August 9, 1917.) [15]

---

**Order Denying Motion for New Trial.**

This cause coming on to be heard on this 20th day of August, 1917, upon defendant's motion for new trial, and the Court having heard the argument of counsel and being advised, denies said motion, to which ruling defendant excepts, and its exception is allowed.

Done in open court this 20th day of August, 1917.

EDWARD E. CUSHMAN,  
Judge.

(Filed August 20, 1917.) [16]

---

**Judgment.**

At the regular February, 1917, term of said Court, —present the Hon. EDWARD E. CUSHMAN, presiding Judge.

This cause coming on regularly for trial upon the



#### 14 *Sunset Telephone and Telegraph Company*

26th day of June, 1917, pursuant to assignment, the plaintiffs appearing in person and by Gordon & Easterday, their attorneys; Messrs. Bates & Peterson appearing as attorneys for defendant; both parties being ready for trial a jury was duly impanelled and sworn to try the issues, and the respective parties having introduced their evidence and rested, the arguments of counsel having been heard, the jury duly instructed by the Court retired, and

Thereafter on the 28th day of June, 1917, returned into court a verdict finding in favor of the plaintiffs, J. A. Hoshor and Edna R. Hoshor, and against the defendant, Sunset Telephone and Telegraph Company, a corporation, in the sum of Thirty-seven Hundred and Fifty Dollars (\$3750.00), which verdict was duly received and entered of record, and

Thereafter on the 20th day of August, 1917, said cause came on to be heard upon the motion of the defendant for a judgment notwithstanding the verdict of the jury, which motion was denied; and the motion and petition of the defendant for a new trial having been heard, considered and denied by this Court, now, therefore, upon motion of Gordon & Easterday, attorneys for the plaintiffs, it is

CONSIDERED, ORDERED and ADJUDGED that the plaintiffs J. A. Hoshor and Edna R. Hoshor, husband and wife, do have and recover judgment against the Sunset Telephone and Telegraph Company, a corporation, in the sum of Thirty-seven Hundred and [17] Fifty Dollars (\$3750.00) damages, together with the sum of Seventy-five and 75/100 Dollars (\$75.75) costs as taxed herein,

amounting in the aggregate in the sum of Thirty-eight Hundred Twenty-five and 75.100 Dollars (\$3825.75); to all of which defendant excepts and its exception is allowed. It is further

ORDERED that the February, 1917, term of this court is hereby continued and extended for a period of sixty days from the date hereof for all purposes of the above cause.

Done in open court this 20th day of August, 1917.

EDWARD E. CUSHMAN,  
Judge.

(Filed August 20, 1917.) [18]

---

**Stipulation Regarding Transcript of Record.**

IT IS HEREBY STIPULATED AND AGREED BY AND BETWEEN the respective parties by their respective attorneys herein, that the transcript to be prepared by the clerk of this court for the Circuit Court of Appeals for the Ninth Circuit, may have omitted therefrom the following:

The original complaint.

The original summons and return of service.

The demurrer to original complaint.

Order of Court on demurrer.

Petition for removal.

All captions, except the caption to the amended complaint; all endorsements, file-marks, verifications and acceptances of service on the pleadings, stipulations and orders.

Dated September 29, A. D. 1917.

GORDON & EASTERDAY,  
Attorneys for Plaintiffs.

BATES & PETERSON,  
Attorneys for Defendant.

(Filed October 8, 1917.) [19]

---

**Stipulation to Forward Original Exhibits to Circuit  
Court of Appeals.**

IT IS STIPULATED that the original exhibits introduced in evidence in the trial of this cause, or substituted copies therefor, may be attached to the bill of exceptions and transmitted to the Circuit Court of Appeals for the Ninth Circuit, in lieu of copies to be made by the clerk.

Dated September 29, A. D. 1917.

GORDON & EASTERDAY,  
Attorneys for Plaintiffs.

BATES & PETERSON,  
Attorneys for Defendant.

(Filed October 8, 1917.) [20]

---

**Order Directing Original Exhibits Instead of Copies  
Forwarded Circuit Court of Appeals.**

Now on this 6th day of October, A. D. 1917, on stipulation of the respective parties, through their attorneys,—

IT IS ORDERED that the clerk of this court attach the original exhibits introduced in evidence in the trial of this cause to the Bill of Exceptions, and transmit them to the United States Circuit Court

of Appeals for the Ninth Circuit, in lieu of copies.

EDWARD E. CUSHMAN,  
Judge.

(Filed October 8, 1917.) [21]

---

**Stipulation Regarding Original Exhibits.**

IT IS HEREBY STIPULATED AND AGREED between the plaintiffs and the defendants by their respective counsel that Plaintiffs' Exhibit 1, being the iron rod and guy wire introduced in evidence herein, and Defendant's Exhibits B-1 and B-2, being maps of the Sixth Avenue pole line, introduced in evidence herein, are not essential or necessary to the hearing in the Circuit Court of Appeals, and the presence of said exhibits will be of no assistance to said Circuit Court of Appeals in the determination of an appeal herein.

IT IS FURTHER STIPULATED that said exhibits need not be made a part of the record herein, and need not be transmitted to the Circuit Court of Appeals.

IT IS FURTHER STIPULATED that the order heretofore entered herein directing that original exhibits be transmitted to the Circuit Court of Appeals may be vacated and set aside, in so far as the foregoing exhibits are concerned.

Dated, Tacoma, Washington, October 25th, A. D. 1917.

GORDON & EASTERDAY,  
Attorneys for Plaintiffs.

BATES & PETERSON,  
Attorneys for Defendant.

(Filed October 26, 1917.) [22]



**Order Concerning Transmission of Original Exhibits  
to Circuit Court of Appeals.**

Plaintiff and defendant having filed a written stipulation herein to effect that Plaintiffs' Exhibit 1, and Defendant's Exhibit B-1 and B-2 are not necessary or essential to a hearing in the Circuit Court of Appeals, and that the same need not be transmitted with the record in this cause,—

IT IS BY THE COURT ORDERED that Plaintiffs' Exhibit 1, being an iron rod and guy wire, and Defendants' Exhibit B-1 and B-2, being maps of a certain pole line, need not be made a part of the record herein, and that said exhibits need not be transmitted to the Circuit Court of Appeals.

IT IS FURTHER ORDERED that the order directing the transmission of said original exhibits to the Circuit Court of Appeals be, and the same is hereby vacated and set aside, in so far as the foregoing exhibits are concerned.

Dated October 26th, A. D. 1917.

EDWARD E. CUSHMAN,  
Judge.

(Filed October 26, 1917.) [23]

---

**Journal Order Extending Term.**

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 28th day of June, 1917, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly

taken and correctly copied from the journal of said court, to wit:

“Upon motion of Chas. T. Peterson, it is ordered that the entry of judgment be stayed until Tuesday, July 3, 1917, and the present term of court extended to that time for this purpose.” [24]

---

**Order Extending Term.**

Upon application of defendant it is by the Court ordered that the February, 1917, term of this court be, and the same is hereby continued and extended for a period of sixty days for all purposes of the above cause.

EDWARD E. CUSHMAN,  
Judge.

(Filed June 29, 1917.) [25]

---

**Order Extending Time to and Including September 5, 1917, to Prepare and Serve Bill of Exceptions.**

By consent of parties it is ORDERED that the time within which the defendant may prepare and serve a bill of exceptions in the above-entitled case be, and the same is hereby extended to and including September 5th, A. D. 1917.

Dated, July 20th, A. D. 1917.

EDWARD E. CUSHMAN,  
Judge.

(Filed July 20, 1917.) [26]

**Statement of Facts and Bill of Exceptions.**

BE IT REMEMBERED, That heretofore, on the 26th day of June, 1917, the above-entitled cause came on regularly for trial before Honorable E. E. Cushman, Judge of the above-entitled court sitting with a jury, plaintiffs appearing with M. J. Gordon and J. H. Easterday, their attorneys, and defendant appearing with Charles O. Bates and Charles T. Peterson, its attorneys, the jury having been duly empaneled and sworn to try the cause, counsel for plaintiffs having stated to the jury the facts which plaintiffs expected to prove on the trial thereof, and defendant reserving its opening statement, the following proceedings were had and done:

**Testimony of Edna R. Hoshor, One of the Plaintiffs.**

EDNA R. HOSHOR, one of the plaintiffs, called as a witness in plaintiff's behalf being duly sworn, testified as follows:

My name is Edna R. Hoshor. I am one of the plaintiffs in this action, and am thirty years old. In September, 1913, we lived at the end of Sixth Avenue. My husband and I had a store there and were running the postoffice. We had a telephone in our place of business belonging to the defendant.

In September of that year I was going out for a walk one evening with my mother and my little girl, who was two years old. We walked up over Sixth Avenue; I was wheeling the buggy when an automobile came passed from the opposite direction to which we were walking. It was running fast, and

(Testimony of Edna R. Hoshor.)

we got off the planking with the buggy to avoid the jar of the automobile. When I got off the planking I stopped to see if the baby had *his* bottle all right, and while I was leaning over the buggy something happened. The [27] next thing I remembered they were holding me up. It was between 8:30 and 9:00 o'clock in the evening, and was not very light. When I regained consciousness I was in terrible pain mostly in my back, my head, my shoulders and my groin, and between my shoulder blades. I guess my back was hurting the worse. My husband, my mother and child, and a Mr. Dunton who runs the ostrich farm were present. I was taken home where I was confined to my bed for about two weeks. I was confined to my home about a month, receiving medical treatment. Previous to that time I was in good health, weighing about one hundred and thirty or one hundred and thirty-five pounds. After I was able to get out of the house I could not hardly stand up. I had to either lie or sit down most of the time. Before the injury I had done by own housework, but since the injury I have not been able to do much. Even yet I cannot do my housework. After the injury I went down to ninety-five pounds. That was, I think, about two or three weeks afterward.

(Transcript, pp. 3-15.)

**Testimony of J. A. Hoshor, One of the Plaintiffs.**

J. A. HOSHOR, one of the plaintiffs, called as a witness in plaintiffs' behalf, being duly sworn, testified as follows:



(Testimony of J. A. Hoshor.)

I am one of the plaintiffs in this case, the husband of Mrs. Hoshor, who just testified. In September, 1913, we lived at the end of the Sixth Avenue car-line, on Titlow Beach. There were a line of poles on the right hand, or north side of Sixth Avenue at that time, which were strung eight telephone wires of the defendant Sunset Telephone and Telegraph Company.

On the evening of September 18th, about eight o'clock, just dusk, Mrs. Hoshor, Mrs. Graham, her mother, and our little girl were going out for a walk. Mrs. Hoshor was wheeling the baby in the baby carriage. At the time the accident happened Mrs. Graham and the little girl were about half a block ahead, and Mrs. Hoshor and I [28] were together. When we reached the point right opposite the ostrich farm an automobile came along. We stepped off the planking on the south side of Sixth Avenue and Mrs. Hoshor stopped, and I went ahead a few steps. As the automobile came along I heard a noise, and looked around to see if she was coming. She was laying in a heap, seemed to be just falling over the baby buggy, and the baby buggy was tipped over. I went back and picked her and the baby up. Just then I saw Mr. Dunton coming out of his door upstairs. He had a flashlight and I called to him. Mrs. Hoshor was unconscious at the time, and when I looked around I saw a big rod about ten feet long, and a wire alongside of it; they were lying right alongside of her. Before the accident this rod and wire was hung up over the street attached to a tele-

(Testimony of J. A. Hoshor.)

phone pole on the north side of the street by the garage at the ostrich farm, and the wire ran across the street to a large stump on the southerly side of Sixth Avenue. The telephone pole was about forty feet high, and the wire was fastened to the top. It was about 100 feet from the top of the pole to the top of the stump, and the wire ran down from the top of the pole to about twenty feet south of the southerly side of Sixth Avenue, where it was fastened into the iron rod, and then one wire was fastened on the other end of the iron rod, and ran over about twenty-five feet and was wrapped around the top of the cedar stump. The cedar stump was about eleven feet high, and about four feet in diameter at the base. The wire and rod had been fastened in this manner for about a year. When we got Mrs. Hoshor home she had a big lump on her head, and a bruise on the left side, and on her left shoulder, which were black and blue. She was also bruised on the right side of her groin, and was considerably swollen on her back. She was in great pain and hardly knew what she was doing for several hours afterward.

There had been no change in this guy wire during the year as near as I could observe. [29]

It was admitted that Sixth Avenue was a public and generally traveled street of the city of Tacoma. Sixth Avenue at the place where the accident happened is about one hundred feet wide, and the pole to which the wire is attached is in the street right near the edge of the planking. The defendant fur-

(Testimony of J. A. Hoshor.)

nished me with telephone service from wires which were on these poles.

(Transcript, pp. 15-40.)

**Testimony of Edward Miles Dunton, for Plaintiffs.**

EDWARD MILES DUNTON, a witness called in plaintiffs' behalf, being duly sworn, testified as follows:

In 1913 I was running the ostrich farm at the end of Sixth Avenue on Titlow's Beach. There was a pole line on the north side of Sixth Avenue. I remember the telephone pole connected by a guy wire running across the street. One evening in September, 1913, I was sitting up in my residence and heard a noise; I thought some animal was after the ostriches and grabbed an ever-ready searchlight and ran out and flashed it across the farm. While I was doing this I heard someone call me across the street and ask me to come right away. I went up there and saw Mr. and Mrs. Hoshor and the baby and Mr. Hoshor's mother-in-law, Mrs. Graham, there. Mrs. Hoshor was lying down on the planking right close to it. She seemed to be unconscious for a moment. I assisted Mr. Hoshor to take her to their home, a distance of about three hundred yards. When I reached the place where Mrs. Hoshor was lying on the ground there was a guy wire down; the one that had been suspended across the street. Exhibit 1 is the wire and rod I refer to. A wire was fastened to the top of the pole which stood on the north side of the street, and ran down across the street and

(Testimony of Edward Miles Dunton.)

attached to the end of the rod, and then one wire was attached to the other end of the rod and around the top of a big cedar stump. The wire had been there fully [30] eleven months before Mrs. Hoshor got hurt. The rod was suspended on the southerly side of the street, and partially over the planking. I did not look at the wire to learn whether it had been broken or not.

(Transcript, 40-49.)

**Testimony of Emma E. Graham, for Plaintiffs.**

EMMA E. GRAHAM, a witness called in plaintiff's behalf, being duly sworn, testified as follows:

I am Mrs. Hoshor's mother, and am a nurse by occupation. I recall Mrs. Hoshor receiving an injury on Sixth Avenue in September, 1913. Mr. and Mrs. Hoshor and the little girl and I went out for a walk up Sixth Avenue. The little girl and I were about half a block ahead of Mr. and Mrs. Hoshor. Mrs. Hoshor was wheeling the baby in a baby carriage. I heard a noise and looked around, and saw Mr. Dunton running with a flashlight. I went back as fast as I could, and found Mrs. Hoshor lying down with the buggy, and that wire, which was not there when I and the little girl went along, had fallen down and had evidently struck Mrs. Hoshor and the front of the baby buggy. Mrs. Hoshor seemed to be unconscious. We took her home and put her to bed. Her back was very red and swollen. She complained terribly about it.

(Transcript, pp. 49-55.)



**Testimony of L. C. Cover, for Plaintiffs.**

L. C. COVER, a witness called in plaintiffs' behalf, being duly sworn, testified as follows:

I am, and in September, 1913, was, United States Weather Observer. As shown by my official records the condition of the weather between eight and nine o'clock on the evening of [31] September 8th, at Tacoma, Washington, was as follows:

Partially cloudy; temperature 59; wind blowing north 7 miles per hour, no rain.

(Transcript, pp. 55-56.)

There was other testimony going to the nature and extent of plaintiff's injuries, but as such testimony has no relation to the exception claimed, it is omitted.

PLAINTIFFS REST.

**DEFENDANT'S CASE.**

**Testimony of Norton L. Taylor, for Defendant.**

NORTON L. TAYLOR, a witness called in defendant's behalf, being duly sworn, testified as follows:

I am Assistant Engineer of the Light Department of the city of Tacoma, and have occupied that position for eight or nine years. I am the custodian of the records of the city of Tacoma showing the ownership of all poles and pole lines, and particularly the pole line on Sixth Avenue. The official record which I have shows that all the poles on the north side of Sixth Avenue, from the city to Titlow's Beach, are owned by the city of Tacoma.

(Testimony of Norton L. Taylor.)

It was agreed between plaintiffs and defendant that the guy line in question was attached to a pole No. 12,386.

(Transcript, p. 59.)

Witness further testified, pole No. 12,386 is owned by the city of Tacoma. Defendant's Identification A, is a form permanently recording information as to wires, location and time every pole has been set. We are supposed to have similar cards for every pole owned by the city of Tacoma, but I am sure we do have for this particular Sixth Avenue line. There are one hundred and twenty [32] poles in that line, all owned by the city of Tacoma.

Whereupon Exhibit "A" was offered and received in evidence without objection.

(Transcript, p. 60.)

Defendant's Exhibits B-1 and B-2, being maps showing pole lines of the city were offered and received in evidence without objection.

Pole No. 12,386 was set in June, 1911; a transmission line of the city, consisting of two heavy wires is carried on the top of the pole, and eight wires of the telephone company on the lower cross-arm. The pole line is within the street limits.

(Transcript, pp. 58-63.)

### **Testimony of James P. Dunphy, for Defendant.**

JAMES P. DUNPHY, a witness called in defendant's behalf, being duly sworn, testified as follows:

In September, 1913, I was District Superintendent of the Sunset Telephone & Telegraph Company. I

(Testimony of James P. Dunphy.)

supervised the maintenance and construction of the company's plant, among other places at Tacoma. I am acquainted with the pole line on Sixth Avenue of which the pole and guy wire in question are a part. It was not built, owned or maintained by defendant. We have one cross-arm on the pole line carrying eight wires. That arm was put on by the telephone company. We have no arrangement or agreement with the city about placing our lines on its poles, except a sort of a reciprocity agreement, simply a matter of trading privileges on each other's poles. They have wires on our poles where convenient, and we have wires on their poles where convenient. The city maintains and keeps its pole lines in repair, and we maintain and keep our pole lines up. That was the arrangement with reference to the wires on [33] this particular pole line. In September, 1913, we were operating our telephones to Titlow's Beach by using the pole line in question. The telephone company, however, has never taken any part in or done anything toward the maintenance of the pole line, except to maintain its own circuit of wires. Our men sometimes go up the poles where they have occasion to place or repair our wires. The city has nothing to do with the maintenance of our wires, which are on its poles. If there was a break in one of our circuits, making it necessary for someone to go up a pole, one of our men would go up.

(Transcript, pp. 63-67.)

**Testimony of A. B. Taylor, for Defendant.**

A. B. TAYLOR, a witness called in defendant's behalf, being duly sworn, testified as follows:

I am, and in September, 1913, was, claim agent for the city of Tacoma. I investigated the claim made by Mrs. Hoshor for injuries claimed to have been suffered by her on the night of September 18th, 1913. I went out to pole No. 12,386 with Mr. Perkins, of the telephone company, and two city linemen. I took the line and rod, Exhibit 1, and fastened one wire to the top of the pole, and took the other end of the wire and drew it tight about the cedar stump, drawing it as tight as three of us could pull it. We released it suddenly to see how far the rod would go toward the plank walk, or the street on Sixth Avenue. We did this two or three times. The rod was suspended about fifteen feet high, and when we let it loose suddenly it would swing toward the road from forty-three to forty-five feet. We measured the distance from the planking to the end of the rod and found it to be substantially twenty feet.

(Transcript, pp. 67-74.)

**Testimony of S. V. Peterson, for Defendant.**

S. V. PETERSON, a witness called in defendant's [34] behalf, being duly sworn, testified as follows:

I am line foreman for the city of Tacoma. I helped construct the Sixth Avenue pole line when it was built in 1911. Pole No. 12,386 was guyed from a wire to the top of the pole running across to the south side of Sixth Avenue, and anchored to a dead



(Testimony of S. V. Peterson.)

man five feet long buried about six feet in the ground, a regular standard guy. The dead man was of cedar wood from ten to fourteen inches in diameter, and five feet long, a hole bored in the middle, and a rod put through with a washer and nut on it, and then tightened up. I do not know when the guy wire was removed from the dead man and connected up with the stump. After September, 1913, I went out and took the guy wire down from the pole. I assisted in conducting the experiment testified to by Mr. Taylor. It must have been six or seven feet from where the rod fell to the planking. I have stretched many guy wires in my experience, and in making the experiment we stretched the wire about the way it is stretched in regular work.

(Transcript, pp. 74-81.)

**Testimony of Frank Richards, for Defendant.**

FRANK RICHARDS, a witness called in defendant's behalf, being duly sworn, testified as follows:

In September, 1913, I was line foreman for the city of Tacoma. I constructed the Sixth Avenue pole line for the city. Pole No. 12,386 was guyed as stated by Mr. Peterson. I was out on the line with Mr. Taylor when the experiment was conducted. I should judge that the rod struck the ground about 10 feet south of the plank roadway. I do not know when the guy wire was detached from the anchor, or dead man, and transferred to the stump. At the present time the top of pole No. 12,386 leans away from the plank road.

(Transcript, pp. 81-84.) [35]

**Testimony of B. W. Collins, for Defendant.**

B. W. COLLINS, a witness called in defendant's behalf, being duly sworn, testified as follows:

I am an electrical engineer, and have followed that business for nearly twenty years; and as such I am familiar with electrical construction, and with the construction of pole and transmission lines.

In September, 1913, I was Superintendent of Electrical Works for the city of Tacoma, and had been so engaged since May, 1910. I issued the orders for and planned the type of construction of the Sixth Avenue pole line for the city of Tacoma. The line is what is known as a standard forty foot pole line. Poles forty feet in length, with tops of standard diameter not less than eight or nine inches at the top set six feet in the ground, and guyed at the curves, or corners where the curves exceed fifteen degrees or more. The guying on small curves is done with a guy wire which is fastened to anchor rods, which are in turn fastened to what is called a dead man five or six feet in the ground, depending upon the nature of the earth. I inspected this line after it was constructed, and it was a standard up-to-date approved construction, such as is generally made of such lines. The last time I personally inspected it was immediately after it was constructed. The city of Tacoma paid for the construction and maintained it down to the time I left which was in September, 1916, making all the repairs which were made. At the time the line was constructed it was contemplated that the telephone wires would be placed on it, and it was con-

(Testimony of B. W. Collins.)

structed by the city with that usage in view. It was deemed essential, considering the use of the pole line, to attach these guy wires to dead men such as I have described. I had no knowledge of the [36] change made in the guy on pole No. 12,386, and of its becoming detached. It evidently was detached from the dead man, and attached to the stump by some third party unauthorized so to do. The inspection of these lines is left to subordinates, and when this condition is found it is supposed to be corrected. All of the guy wires on the particular curve where pole No. 12,386 is are guyed to dead men.

(Transcript, pp. 85-90.)

**Testimony of E. E. Perkins and Dr. James R. Yocom,  
for Defendant.**

Mr. E. E. PERKINS and Dr. JAMES R. YOCOM were called as witnesses for defendant, but their testimony had no relation to the exceptions claimed.

DEFENDANT RESTS. [37]

**REBUTTAL EVIDENCE.**

**Testimony of J. A. Hoshor, for Plaintiffs (In  
Rebuttal).**

J. A. HOSHOR, being called in rebuttal, testified further:

Pole No. 12,386 is drawn out, and leans to the south. It is about the same now as it was in December, 1914, when Mr. Taylor conducted his experiment. At the time of the accident the pole was about perpendicular.

(Transcript, pp. 102-104.)

### **Motion for Directed Verdict.**

Thereupon the following took place:

“Mr. BATES.—We move at this time, if the Court please, the evidence all being in, that the Court direct the jury to bring in a verdict for the defendant, for the reason that the evidence wholly fails to establish the cause of action set forth in the complaint, and wholly fails to give any right for a verdict in favor of the plaintiff.”

(Transcript, p. 104.)

The motion was argued by counsel for the respective parties, and at the close of the argument the Court overruled the motion, and in doing so stated as follows:

“The COURT.—The motion will be denied. It is true, that, so far as these falling pole cases that have been cited are concerned, they seem to have been employees who were hurt and the master’s duty was to furnish a safe place to work. Whereas the duty of the defendant here was, as far as the public was concerned, not to help to create a dangerous nuisance. I cannot see but what it comes to nearly the same thing in so far as the *the* protection of employees and the protection of pedestrians on the highways are concerned.

In so far as the sewer case is concerned, you couldn’t expect everyone to build his own sewer in the street. He would not be allowed to do it.

In so far as poles are concerned, that is, poles used by two parties, one of which owns the pole, it seems to me that various complications might arise, in so



far as the operation of the wires are concerned, like these [38] two cited cases. Take the case where the glass insulator fell from the Western Union wire. In so far as the separate wires are concerned, the party who has these wires owns them and uses them. There is a separate responsibility, a separate duty and separate liability in so far as their causing damage is concerned. This applies to the Western Union Company's case and also to the case where the defectively insulated wire was put up in the tree.

Each owner and user would be bound to see that his wire was kept safe, but, so far as the pole is concerned and the guy wire to support it, they are instrumentalities of the owner and user of both sets of wires.

The pole would have stood there is carrying no wires on it without a guy wire. Being on a curve, it is quite evident that the different sets of wires would have a tendency to pull the pole over. The guy wire, the pole and the wires the pole carried are all a part of one instrumentality for the purpose of holding the wires up off the ground out of the way, or help to that end.

The reasoning of the judge in the case where he held that, if the defendant company doesn't have the necessary control to inspect and keep in a reasonably safe condition poles, it shouldn't enter upon and further continually and continuously burden those poles with its wires, unless it reserves that right for itself, appeals to me as sound law.

Regarding the rule of a number of cases cited where the defect in the roadbed, or street adjacent

to the tracks, where one of the companies owns the tracks and a licensee uses them, it appears to me that they are not in point. If they had been cases where there was a train toppled over on account of that defect and some one had been injured, the case would have been in point.

But merely where some one passes over the road-bed, if there are holes and somebody steps into a hole and gets hurt, after the train goes by and no one claims that the hole was created by the use made by the licensee, it is not in point. [39]

Regarding the case of the bill poster. If anybody painted a sign on a board or posted a sign on it, there isn't anybody who would reasonably argue that that would make the board appreciably weaker or more likely to fall. If it had been a case where the bill poster loosened the sign while putting his sign on it, it would be more nearly in point."

(Trans., pp. 105-107.)

Defendant requested an exception, which the Court allowed.

### **Instructions.**

Thereupon the case was argued to the jury by counsel for the respective parties, and the Court instructed the jury, as follows:

"Gentlemen of the jury, you will take out with you to your jury-room the plaintiffs' complaint which has been filed, and the defendant's answer, the pleadings in the case. The arguments have already advised you about what the dispute is, and it is elaborated and set out more in detail in these pleadings, which you will take out with you.

Briefly, the plaintiff says that the defendant had the telephone line out there near the end of Sixth Avenue on the highway, that it had its wires on a pole of the city, that is, that might be the exact language of the complaint, but there is no dispute in the evidence but what this pole is a pole that the city put there; that the defendant company had its wires on that pole, and that the pole was guyed, that there was a guy wire and rod bracing the pole from the road, holding it from falling away towards the road; that while the two plaintiffs, and that while the plaintiff Mrs. Hoshor, was rightfully using this highway in walking under that guy wire, that it became loosened through the negligence of the defendant company and fell upon her and injured her. For this injury, the plaintiffs ask a verdict at your hands of \$10,000.

## II.

The defendant denies that it was negligent, and denies the extent of her injury, and that she was damaged in any such amount as claimed.

## III.

Those are the issues you are called upon to try, and the Court instructs you as to the law that even though the telephone wires of the defendant company may have been put upon the pole, that the city had erected there, that nevertheless, it was the duty of the defendant company to exercise ordinary care to see that pedestrians on the highway should not be injured through any instrumentalities which it was using, including this wire that was used to [40] help support its telephone wires, this guy

wire that was used to help support defendant's telephone wires. That is one of the main issues in the case, that is, whether they exercised ordinary care to prevent people using that street from being injured.

#### IV.

Ordinary care is defined as being such care as an ordinarily careful and prudent person would exercise under the same circumstances, and should be proportioned to the peril and danger reasonably to be apprehended from a want of proper prudence.

#### V.

The burden of establishing, by a fair preponderance of the evidence, the allegations made in the complaint, rests upon the plaintiff; that is, before they can recover anything it is necessary that they should establish by a fair preponderance of the evidence that this injury, if any, that the plaintiff Mrs. Hoshor sustained, happened in the same way in which they allege that it happened. They have to establish before they can recover anything by a fair preponderance of the evidence that this wire and rod fell in the manner they have described, and that the cause of its fall was the negligence of the defendant company. Unless they do establish that by a fair preponderance of the evidence, they can recover nothing.

#### VI.

They also have to show by a fair preponderance of the evidence the extent of the damage, and they have to show by a fair preponderance of the evidence before you can allow, say, on account of these



miscarriages of which complaint has been made, before you could allow for damage on account of an injury of that nature, they would have to show by a fair preponderance of the evidence that that injury was the direct and proximate result of the wire or rod striking her, that they claim fell upon her. The company would not be liable for all of the afflictions that she might suffer during the remainder of her life unless they were caused directly and naturally by the falling of this rod or wire.

#### VII.

Preponderance of the evidence means the greater weight of the evidence. That evidence preponderates which is of such a character and so appeals to your intelligence and your understanding, your reason and your experience, as to create and induce belief in your minds, and if there is a dispute in the evidence, that evidence preponderates which is so strong in those particulars as to overcome and weigh down that evidence that has been produced against it.

#### VIII.

Naturally, in considering the case, the first question for you in taking up this case is to determine whether the plaintiff, Mrs. Hoshor, was injured as she claims she was injured, by the falling wire or rod, and after you have determined that you will pass on to determine whether the defendant was in any way negligent, as described in the complaint, in permitting that wire to fall. If [41] you find a fair preponderance of the evidence to support these two issues in favor of the plaintiff, you will

then pass on to the question of what, if any, of the plaintiff's injuries which she has described, are by a pair preponderance of the evidence shown to have been caused by the falling of the wire or rod. And then, having determined that issue, you would then pass on to determine the amount that should be allowed the plaintiffs for these injuries which she had so directly and proximately suffered from the defendant's negligence. If you allow the plaintiffs anything, you will confine your allowance to such an amount as in your best judgment will fairly compensate them for the injuries they have so suffered as the direct and proximate result of defendant's negligence which they describe in the complaint. You will not allow anything to them on account of any sympathy you may have for them, and you will not swell our verdict against the defendant on account of any prejudice; if any, you may have against the defendant itself, or because of the fact that it is a corporation. In determining the amount, if you allow the plaintiffs anything, you may take into account the pain or suffering the plaintiff, Mrs. Hoshor, may have endured by impairment to her ability to care for herself and her children, but before you would allow anything on account of any future inconvenience that she may suffer, it must appear with reasonable certainty that there will be future impairment or inconvenience as to her.

### IX.

You are in this case, as in every other case where questions of fact are submitted to a jury for determination, the sole and exclusive judges of every question of fact in the case, the weight of the evi-

dence and the credibility of the witnesses. In weighing the evidence and determining the amount of credit that should be accorded each of the witnesses who have come before you and testified, you will take into account their appearance and demeanor, and the manner in which they gave their testimony, whether it was such as to carry conviction to you and create in your mind the belief that they were trying to tell you exactly what they knew, neither adding to it or taking from it, or whether any of them impressed you as being reluctant, keeping back something that they know, trying to keep from telling you all they knew, or whether, on the other hand, some of them may not have impressed you with being too willing, running along and constantly trying to get something into the case that nobody was asking about. Also you will take into account the situation each witness was in in regard to the transactions about which the witness testified as enabling that witness to know exactly what the truth was, as one witness may be much better situated to know the exact facts than another who was equally honest. You will take into consideration the testimony of each witness by itself, whether it appears probable, reasonable, complete, whether it is corroborated by other evidence in the case, or whether contradicted by other evidence; also you will take into account the interest any witness may have in the case, either as shown by the manner in which he testified or his relation to the case, and both plaintiffs having testified in their own behalf, you will take into account the same tests in weighing



their testimony as you apply to the testimony of other witnesses, including their natural interest in the result of the verdict.

Mr. GORDON.—(At the close of the Court's Instructions.) No exceptions. [42]

Mr. BATES.—Defendant excepts to that part of the Court's instruction in which it tells the jury that even though the wires of the telephone company were on the city poles, it was nevertheless the duty of the telephone company to use ordinary care to see that pedestrians were not injured by any of the instrumentalities used by the telephone company, including the poles, wires, and guy rod.

The COURT.—I did not include the pole. I included the wire.

Mr. BATES.—Well, I will take that part out of the exception.

The COURT.—Exception allowed.

The Court further instructed the jury as follows:

The COURT.—Gentlemen of the jury; the Court submits two forms of verdict, one finding generally for the defendant, which form would be completed, merely by the signature of your foreman; if you find for the defendant, and the other one, finding for the plaintiffs, has a blank left in it for the insertion of the amount at which you assess their recovery, if you find for the plaintiff. When you have agreed, you will cause whichever of these forms which fit your verdict to be completed, apprise the bailiff of the fact that you have agreed, and return into court.

Juror A. M. GODDARD.—Do I understand that the question of the liability of the Sunset people does



not enter into the discussion of the jury?

The COURT.—It certainly does. It is the main dispute.

Juror GODDARD.—I mean as between the Pacific Telephone & Telegraph Company and the city? In other words, can the jury question as to whether the Pacific Company were at all liable in the matter?

The COURT.—I told you you would have to determine whether they exercised ordinary care.

(Transcript, pp. 107–113.) [43]

**Stipulation Re Bill of Exceptions and Statement of Facts, etc.**

IT IS STIPULATED AND AGREED by and between the plaintiffs by their attorneys, M. J. Gordon and J. H. Easterday, and the defendant by its attorneys, Charles O. Bates and Charles T. Peterson, that the foregoing Bill of Exceptions and Statement of Facts contains all of the material facts and evidence introduced at the trial of said cause by and on behalf of the respective parties thereto, together with a statement of all motions, objections and rulings thereon and exceptions taken thereto by the respective parties occurring during the trial of said cause, and that the same may be settled and certified as the Bill of Exceptions herein.

Dated September 28th, A. D. 1917.

GORDON & EASTERDAY,

Attorneys for Plaintiffs, J. A. Hoshor and Edna R. Hoshor, His Wife.

BATES & PETERSON,

Attorneys for Defendant, Sunset Telephone and Telegraph Company, a Corporation. [44]

**Certificate of District Judge to Bill of Exceptions,  
etc.**

United States of America,  
Western District of Washington,  
Southern Division,—ss.

I, E. E. Cushman, the undersigned Judge of the District Court of the United States, Ninth Judicial Circuit, Western District of Washington, Southern Division, before whom the above-entitled cause was tried, do hereby certify that the matters and proceedings set forth in the foregoing Bill of Exceptions are all of the matters and things which occurred at the trial of said cause, and the same are hereby made a part of the record herein.

I further certify that said Bill of Exceptions contains all of the material facts and evidence introduced at the trial of said cause by and on behalf of the respective parties thereto, together with a statement of all motions, objections and rulings thereon, and exceptions taken thereto by the respective parties occurring in the trial of said cause, and the same is hereby made a part of the record in said cause, together with the exhibits introduced by the respective parties upon said trial, which will be filed with the clerk of this court as directed by an order heretofore made, and the Court hereby settled and allows said Bill of Exceptions in the presence of counsel for the respective parties hereto, they being present and concurring therein.

IN WITNESS WHEREOF I have hereunto set my hand this 6th day of September, A. D. 1917, at Tacoma, Washington, in said District.

EDWARD E. CUSHMAN,  
Judge.

(Filed October 8, 1917.) [45]

---

**Certificate of Clerk of United States District Court  
to Original Exhibits.**

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the papers enclosed in the envelope hereto attached are the original exhibits introduced at the trial in the case of J. A. Hoshor and Edna R. Hoshor, Husband and Wife, Plaintiffs versus Sunset Telephone and Telegraph Company, a Corporation, Defendant, No. 1752, in this court at Tacoma, on behalf of the plaintiffs and the defendant, which are required by stipulation of counsel and order of Court to be attached to the Bill of Exceptions and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in the appeal of said cause, to wit:

Plaintiffs' Exhibit No. 2, Photograph.

Defendant's Exhibit "A," Pole Record of City of Tacoma.

ATTEST my hand and the seal of said District Court at Tacoma, this 29th day of October, A. D. 1917.

[Seal]

FRANK L. CROSBY,  
Clerk.

By F. M. Harshberger,  
Deputy Clerk. [46]



**Plaintiffs' Exhibit No. 2.**



[Endorsed]: No. 1752. United States District Court, Western District of Washington. J. A. Hoshor et ux. vs. Sunset Tel. & Tel. Co. Plaintiff's Exhibit No. 2.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jun. 26, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

## Defendant's Exhibit "A."

## POLE RECORD

Department of Light &amp; Water

No. 12386

Location

1st S. W. of 8th Ave. Mon on No side 6th Ave. forward

Reset

Date Set 6-11

Diam. Top 9"

Painted

Length 40'

Stepped

Butts Treated

Kind of Ground

Sand

Suspended  
Mast Arm  
Pole  
Tungsten  
ARC

		4				1				N. & S. E. & W.				1				2				3				4				Pole Owner	
Arm	Size Wire																														
No.	Circuit																														
1	Voltage																														
Arm	Size Wire																													Transformer No.	
No.	Circuit																														
2	Voltage																														
Arm	Size Wire																													Order No.	
No.	Circuit																														
3	Voltage																														
Arm	Size Wire																														
No.	Circuit																														
4	Voltage																														

Give description and location of all guys.

REMARKS:

L 642

[Endorsed]: No. 1752. United States District Court, Western District of Washington. J. A. Hoshor et ux. vs. Sunset Tel. & Tel. Co. Defendant's Exhibit "A."

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jun. 26, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

**Petition for Writ of Error.**

Sunset Telephone and Telegraph Company, a corporation, defendant in the above-entitled cause, feeling itself aggrieved by the judgment entered herein on the 20th day of August, 1917, comes now and petitions this Court for an order allowing it to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, there to correct certain errors committed to the prejudice of defendant, and which more in detail appear from the Assignments of Error filed with this petition.

Defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to said United States Circuit Court of Appeals.

CHARLES T. PETERSON,

CHARLES O. BATES,

Attorneys for Defendant.

(Filed October 8, 1917.) [47]

---

**Assignment of Errors.**

Comes now Sunset Telephone and Telegraph Company, a corporation, defendant, and assigns error in the trial, decisions, rulings, orders and judgment of the Honorable District Court in said cause, as follows:



## I.

The Honorable District Court erred in denying defendant's motion, made at the close of all the testimony, to instruct the jury to bring in a verdict in defendant's behalf and against the plaintiffs, for the reason that the evidence wholly failed to establish the cause of action set forth in the complaint, and wholly failed to give any right to a verdict in plaintiffs' behalf.

(a) In holding that the evidence was sufficient to show that the transmission pole and guy line in question were an agency or instrumentality in possession of, or under the control of the defendant.

(b) In holding that there was any duty on the part of defendant to make any inspection, or to exercise any care in the maintenance of the pole or guy line in question, the falling of which is claimed to have caused plaintiffs' injuries.

(c) In holding that there was sufficient testimony to submit to the jury the question of whether or not the cedar stump to which the guy line in question was fastened was an unsafe means of securing the same.

(d) In submitting the question of defendant's negligence to the jury in view of the fact that there was no evidence that a reasonable inspection would have disclosed the defect in the fastening of the guy line, or wire, to the cedar stump in question.  
[48]

(e) In refusing to rule, as a matter of law, that defendant did not exercise control, and had no right to exercise control over the pole or guy line in ques-

tion, the falling of which, it is claimed, caused plaintiffs' injuries.

(f) In failing to rule, as a matter of law, that the evidence wholly failed to show the violation or neglect on the part of defendant of any legal duty towards plaintiffs in connection with the maintenance of the pole and guy line in question.

(g) In failing to rule, at defendant's request, that the evidence was wholly insufficient on plaintiffs' theory of the case, or under any theory of law, to submit the question of defendant's negligence to the jury.

## II.

The Court erred in failing and refusing to rule as a matter of law that under the uncontraverted evidence offered showing that the pole and guy line in question were owned by the city of Tacoma, that defendant was a mere licensee in the use of the pole in question, and that it did not have any control over the same, and that it was under no legal duty to inspect the same, or the guy line attached thereto, or to keep the pole or guy line in repair, and that therefore there was no evidence to justify the submission of the question of defendant's negligence in the maintenance and repair of the pole and guy line in question to the jury.

## III.

The Court erred in its charge to the jury wherein it instructed the jury that even though the wires of defendant telephone company were on the city poles, and on the pole in question, it was nevertheless the duty of the telephone company to use ordinary [49]

care to see that pedestrians were not injured by any of the instrumentalities used by the telephone company, including the wires and guy rod in question, which portion of the charge was duly excepted to by defendant at the time, and before the jury retired to consider of their verdict.

WHEREFORE, defendant prays that said judgment of the Honorable District Court of the United States for the Western District of Washington, Southern Division, be reversed.

Dated this 2d day of October, A. D. 1917.

CHARLES O. BATES,

CHARLES T. PETERSON,

Attorneys for Defendant.

Office and Postoffice Address,

1107 National Realty Building,

Tacoma, Washington.

(Filed October 8, 1917.) [50]

---

### **Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, that Sunset Telephone and Telegraph Company, a corporation, defendant herein, as principal, and Fidelity and Deposit Company of Maryland, a corporation, as surety, for and on behalf of said principal, are each held and firmly bound unto J. A. Hoshor and Edna R. Hoshor, husband and wife, plaintiffs herein, in the penal sum of Five Hundred Dollars, to be paid them, and each of them, their heirs, executors, administrators and assigns, for which payment, well and truly to be made, we bind ourselves, and

each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated this 6th day of October, A. D. 1917.

Whereas, the above-named principal, Sunset Telephone and Telegraph Company, a corporation, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the District Court of the United States for the Western District of Washington, Southern Division, rendered and entered on the 20th day of August, 1917.

NOW, THEREFORE, the condition of this obligation is such that if the above-bounden principal, Sunset Telephone and Telegraph Company, a corporation, should prosecute said writ of error to effect, and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

SUNSET TELEPHONE AND TELEGRAPH  
COMPANY,

By CHARLES O. BATES and  
CHARLES T. PETERSON,

Its Attorneys. [51]

FIDELITY & DEPOSIT COMPANY OF  
MARYLAND.

[Corporation Seal] By I. C. ROWLAND,

Atty.-in-Fact.

The above bond and sufficiency of surety thereon



are hereby approved this 6th day of October, A. D. 1917.

EDWARD E. CUSHMAN,  
Judge.

(Filed October 8, 1917.) [52]

---

**Order Allowing Writ of Error.**

On this 6th day of October, A. D. 1917, comes the defendant, by its attorneys, and files herein and presents to the Court its petition praying for the allowance of a writ of error on assignments of error intended to be urged by them, and praying also that a transcript of record and proceedings, upon which the judgment herein was rendered, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. That such other and further proceedings may be had that may be proper in the premises.

On consideration whereof the Court does hereby allow the writ of error upon defendant giving bond according to law, in the sum of Five Hundred Dollars, which will operate as a bond for costs.

EDWARD E. CUSHMAN,  
Judge.

(Filed October 8, 1917.) [53]

**Writ of Error (Copy).**

UNITED STATES OF AMERICA.

The President of the United States of America, to  
the District Court of the United States, for the  
Western District of Washington, Southern  
Division, GREETING:

Because in the record and proceedings, as also  
in the rendition of the judgment before you, be-  
tween J. A. Hoshor and Edna R. Hoshor, his wife,  
plaintiffs below, and defendants in error, and Sun-  
set Telephone and Telegraph Company, a corpora-  
tion, defendant below, and plaintiff in error, a mani-  
fest error hath happened to the damage of said Sun-  
set Telephone and Telegraph Company, a corpora-  
tion, we being willing that such error, if any, hath  
happened, should be duly corrected, and full and  
speedy justice done to the plaintiff in error afore-  
said, on this behalf do command you, if judgment  
be therein given, that then, under your seal, dis-  
tinctly and openly, you send the record and pro-  
ceedings aforesaid, with all things concerning the  
same, to the Justices of the United States Circuit  
Court of Appeals for the Ninth Circuit, at the court-  
rooms of such court, in the city of San Francisco,  
State of California, together with this writ, so that  
you have the same at said place before the justices  
aforesaid on thirty days from the date of this writ.  
That the record and proceedings aforesaid being in-  
spected, said Justices of said Circuit Court of Ap-  
peals may cause further to be done therein to correct

that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 6th day of [54] October, A. D. 1917.

[Seal of U. S. Court.] FRANK L. CROSBY,  
Clerk of the District Court of the United States, for  
the Western District of Washington, Southern  
Division.

By F. M. Harshberger,  
Deputy Clerk.

The foregoing writ is hereby allowed this 6th day  
of October, A. D. 1917.

EDWARD E. CUSHMAN,  
Judge.

(Filed October 8, 1917.) [55]

---

**Citation on Writ of Error (Copy).**

UNITED STATES OF AMERICA—ss.

The President of the United States to J. A. Hoshor  
and Edna R. Hoshor, Husband and Wife,  
GREETING:

You are hereby cited and admonished to be and  
appear at the United States Circuit Court of Ap-  
peals for the Ninth Circuit to be holden at the city  
of San Francisco, in the State of California, within  
thirty (30) days from the date hereof, pursuant to  
a Writ of Error duly issued and now on file in the  
office of the clerk of the United States District Court  
for the Western District of Washington, Southern

Division, wherein Sunset Telephone and Telegraph Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why so much of the judgment rendered against the said plaintiff in error as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable E. D. WHITE, Chief Justice of the Supreme Court of the United States, this 6th day of October, A. D. 1917.

EDWARD E. CUSHMAN,  
United States District Judge.

(Filed October 8, 1917.) [56]

---

**Certificate of Clerk U. S. District Court to  
Transcript of Record.**

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the case of J. A. Hoshor and Edna R. Hoshor, Husband and Wife, Plaintiffs, versus Sunset Telephone and Telegraph Company, a Corporation, Defendant, No. 1752, in said District Court, as required by praecipe of counsel filed and shown herein, and as the originals thereof appear on file and of record in my office in said District at



Tacoma; and that the same constitute my return on the annexed Writ of Error herein.

I further certify and return that I hereto attach and herewith transmit the original Writ of Error and the original Citation; and that I am transmitting herewith, duly certified and attached to the bill of exceptions herein, the original exhibits called for in stipulation of counsel and order of Court for transmission of the same to the Circuit Court of Appeals.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the plaintiff in error herein, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate and return, 114 folios at 15¢ each .....	\$17.10
Certificate of Clerk to Transcript, 3 folios at 15¢ each and seal .....	.65
Certificate of Clerk to original exhibits, 2 folios at 15¢ each and seal.....	.50

ATTEST my hand and the seal of said District Court at Tacoma, in said District, this 29th day of October, A. D. 1917.

[Seal]

FRANK L. CROSBY,  
Clerk.

By F. M. Harshberger,  
Deputy Clerk. [57]

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

J. A. HOSHOR and EDNA R. HOSHOR, Husband  
and Wife,

Defendants in Error,

vs.

SUNSET TELEPHONE AND TELEGRAPH  
COMPANY, a Corporation,

Plaintiff in Error.

**Writ of Error (Original).**

United States of America.

The President of the United States of America, to  
the District Court of the United States, for the  
Western District of Washington, Southern Division, GREETING:

Because in the record and proceedings, as also in  
the rendition of the judgment before you, between  
J. A. Hoshor and Edna R. Hoshor, his wife, plain-  
tiffs below, and defendants in error, and Sunset  
Telephone and Telegraph Company, a corporation,  
defendant below, and plaintiff in error, a manifest  
error hath happened to the damage of said Sunset  
Telephone and Telegraph Company, a corporation,  
we being willing that such error, if any, hath hap-  
pened, should be duly corrected, and full and speedy  
justice done to the plaintiff in error aforesaid, on  
this behalf do command you, if judgment be therein  
given, that then, under your seal, distinctly and  
openly, you send the record and proceedings afore-

said, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of such court, in the city of San Francisco, State [58] of California, together with this writ, so that you have the same at said place before the justices aforesaid on thirty days from the date of this writ. That the record and proceedings aforesaid being inspected, said Justices of said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 6th day of October, A. D. 1917.

[Seal] FRANK L. CROSBY,  
Clerk of the District Court of the United States,  
for the Western District of Washington, Southern Division.

By F. M. Harshberger,  
Deputy Clerk.

The foregoing Writ is hereby allowed this 6th day of October, A. D. 1917.

EDWARD E. CUSHMAN,  
Judge.

Service of the foregoing Writ is hereby acknowledged, by receipt of a copy of same, this 6th day of October, A. D. 1917.

\_\_\_\_\_,  
\_\_\_\_\_,

Attorneys for Defendants in Error. [59]

[Endorsed]: In the U. S. Circuit Court of Appeals of the United States, Ninth Judicial Circuit, District of Washington. J. A. Hoshor, et ux., Defendants in Error, vs. Sunset Tele. & Tele. Co., a Corporation, Plaintiff in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 8, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

We hereby acknowledge due and legal service upon us of the within Writ of Error at Tacoma, Washington, this 8th day of October, 1917.

GORDON & EASTERDAY,  
Attorneys for \_\_\_\_\_,  
\_\_\_\_\_

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. —

J. A. HOSHOR and EDNA R. HOSHOR, Husband  
and Wife,

Defendants in Error,

vs.

SUNSET TELEPHONE AND TELEGRAPH  
COMPANY, a Corporation,

Plaintiff in Error.

**Citation on Writ of Error (Original).**

United States of America—ss.

The President of the United States to J. A. Hoshor  
and Edna R. Hoshor, Husband and Wife,  
GREETING:



You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to a Writ of Error duly issued and now on file in the office of the clerk of the United States District Court for the Western District of Washington, Southern Division, wherein Sunset Telephone and Telegraph Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why so much of the judgment rendered against the said plaintiff in error as in said Writ of Error, mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable E. D. WHITE, Chief Justice of the Supreme Court of the United States, this 6th day of October, A. D. 1917.

[Seal]

EDWARD E. CUSHMAN,  
United States District Judge. [60]

[Endorsed]: In the Circuit Court of Appeals of the United States, Ninth Judicial Circuit, District of Washington. J. A. Hoshor, et ux., Defendants in Error, vs. Sunset Tele. & Tele. Co., a corporation, Plaintiff in Error. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 8, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

We hereby acknowledge due and legal service

upon us of the within Citation at Tacoma, Washington, this 8th day of October, 1917.

GORDON & EASTERDAY,  
Attorneys for Plffs.

---

[Endorsed]: No. 3074. United States Circuit Court of Appeals for the Ninth Circuit. Sunset Telephone and Telegraph Company, a Corporation, Plaintiff in Error, vs. J. A. Hoshor and Edna R. Hoshor, Husband and Wife, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed November 1, 1917.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



---

IN THE  
United States Circuit Court  
of Appeals  
FOR THE  
NINTH CIRCUIT

NORTHWEST AUTO COMPANY,  
a Corporation,

*Plaintiff in Error,*  
vs.

G. H. HARMON,

*Defendant in Error.*

No. 3075

Brief for Plaintiff In Error

KERR & McCORD,  
*Attorneys for Plaintiff In Error.*

Filed this .....day of February, 1918.

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.





IN THE  
United States Circuit Court  
of Appeals  
FOR THE  
NINTH CIRCUIT

---

NORTHWEST AUTO COMPANY,  
a Corporation,

*Plaintiff in Error,*  
vs.

G. H. HARMON,

*Defendant in Error.*

---

No. 3075

## Brief for Plaintiff In Error

---

The plaintiff in error is a corporation, organized under the laws of the State of Oregon, and is the Northwest distributor for the manufacturers of the Reo automobiles.

On October 17th, 1914, it entered into a certain agreement in writing with the Harmon Motor Car Company of Seattle, Washington, for the sale of Reo automobiles within certain counties in the State of Washington, a copy of which contract is as follows:

*Memorandum of Agreement*, made in triplicate this 17th day of October, 1914, by and between The Northwest Auto Company, hereinafter called the Seller and Harmon Motor Car Co. of Seattle, Wash., hereinafter called the Dealer.

THAT IN CONSIDERATION of the mutual covenants and agreements herein contained, the parties hereto agree as follows:

1. The Seller agrees to sell to the Dealer, and the Dealer agrees to buy from the Seller during the period covered by this agreement 100 Reo automobiles f. o. b., Lansing, Mich. Sight draft against bill of lading with exchange, unless otherwise agreed. Said automobiles are to be as described in the manufacturer's catalog, (excepting vehicles designed for public transportation and commercial wagons, the manufacturer reserving the right to market such cars independently hereof) for distribution within the following described territory:

Whatcom, Skagit, Snohomish, Kittitas, Clallam, Jefferson, Kitsap, Island and San Juan Counties and that part of King County lying north of Auburn in the State of Washington, and agrees to refer to the Dealer all inquiries received by them from parties residing in the above described territory.

2. As part of the consideration for the grant-

ing of the right aforesaid, the Dealer agrees to push the sales of said Reo automobiles to the best of their ability within the territory aforesaid, and also agrees not to sell in any territory other than that hereinbefore specified, and also agrees to refer all inquiries for said Motor Cars from outside of said territory upon their receipt, to the Seller. The sales of REO automobiles to residents outside of the dealer's own territory is a serious trespass upon the rights and earnings of other REO dealers and sub-dealers and tends to destroy the organization and business of the manufacturer and seller and therefore, it is agreed that the territorial restrictions and limits set forth herein are of vital consequence to the manufacturer and seller in their business, as well as to the business of all other REO dealers and REO sub-dealers and for any and each violation of the same by the dealer, the dealer hereby agrees to pay to the seller the sum of two hundred and fifty dollars (\$250.00) as and for liquidated damages. Said sum or sums may be deducted from any deposit he may have with the seller or manufacturer or from any sums which the seller may owe for business done by the dealer. The seller may also cancel this contract for any such violation.

3. The Seller reserves the right to reapportion this territory at any time during the life of this contract, if in the opinion of the Seller the Dealer is not properly promoting the sale of REO cars in all or any part of the above described territory, but shall give at least ten days notice of such re-apportionment.

4. Each automobile will be sold by the Seller to the Dealer at a price of \$1000.00 f. o. b. Portland, until Dec. 1st, 1914, when a discount of twenty-two and one-half per cent ( $22\frac{1}{2}\%$ ) will be allowed the Dealer on all cars sold. The Dealer shall report at



the end of each week to the Seller all names and addresses of parties purchasing cars from the Dealer during that week, together with the factory number of the car or cars sold.

5. All repair parts of the said REO automobiles will be invoiced by the Seller to the Dealer at the manufacturer's current list price, less a discount of 20 per cent. All bills for repair parts are due and payable on or before the 10th of the month following shipment. No exclusive territory given on parts.

6. The Dealer agrees to make no deduction from remittances for merchandise returned, until after the receipt from the Seller of a credit memorandum therefor. And it is further understood and agreed that all repair parts returned for credit, either to the factory or to the Seller shall be shipped **CHARGES PREPAID**.

7. The Dealer agrees to deposit with the Seller the sum of seven hundred and fifty (\$750.00) dollars as a guarantee for the satisfactory performance of this agreement. Said deposit to be returned to him upon the termination of this contract, less any amount that may be then owing to the Seller for repair parts, accessories, or to cover commission on cars sold outside of the above described territory.

8. The Dealer agrees to accept delivery of the said REO automobiles according to the following schedule, and to furnish detailed specifications at least 30 days prior to date of delivery.

MODELS	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	April	May	June	July
Touring Cars . . . . .	..	..	2	1	4	8	20	20	20	15	10	..
.....	..	..	..	..	..	..	..	..	..	..	..	..
.....	..	..	..	..	..	..	..	..	..	..	..	..
.....	..	..	..	..	..	..	..	..	..	..	..	..
Roadsters . . . . .	..	..	..	..	..	..	..	..	..	..	..	..
.....	..	..	..	..	..	..	..	..	..	..	..	..

In the event the Dealer fails to furnish to the Seller detailed specifications at least 30 days prior to the first of the month, during which shipment is to be made, the Seller may deduct such cars from the total allotment and dispose of them as he sees fit, or cancel this agreement at their election.

9. The Dealer hereby agrees to maintain at least one REO automobile for demonstrating purposes and to maintain a suitable salesroom and an efficient shop for the care of said REO automobiles.

10. This agreement is contingent upon delays due to strikes, floods, accidents, or any other causes beyond the control of the manufacturer or Seller, whether occurring in the plant of the manufacturer or in that of any concern from which the manufacturer or Seller purchases parts or equipment. And the shipment of the said REO automobiles covered by this contract is to be made as above specified, subject to the prior orders of other dealers, and as the business of the manufacturer will permit.

11. It is mutually understood and agreed that this contract shall terminate by limitation on July 31st, 1915. It is further understood that this contract supersedes all previous agreements for the sale of REO cars between the contracting parties and that it becomes effective from date of signature by the Seller and the Dealer.

12. It is understood that the place of performance of this agreement is (city) Seattle, (state) Wash.

In Witness Whereof we have hereto set our hands this 17th day of October, 1914.

THE NORTHWEST AUTO COMPANY,

(The Seller)

By F. W. VOGLER, Pres.

HARMON MOTOR CAR CO.,

(The Dealer)

By F. E. HARMON, Pres.

Witness.....

.....

The prices mentioned herein to remain in effect until Nov. 30th, 1914, when they are to be subject to revision providing the manufacturer's list or catalog price and selling price to the Seller is changed.

---

Portland, Oregon, Oct. 17th, 1914.

It is agreed and understood that the attached contract will only be made good and expire on July 31st, 1915, provided a certain note, amounting to Twenty-three hundred and ninety-four and 03-100 (\$2394.03) dollars, falling due in thirty (30) days from today, is paid promptly on the due date and it is further agreed and understood that this Clause is

made part and parcel of the attached Contract, the same as if it had been written or printed therein.

HARMON MOTOR CAR CO.,

(Signed) F. E. HARMON, Pres.

NORTHWEST AUTO CO.,

(Signed) F. W. VOGLER, Pres.

WITNESSED:

C. LE FEBURE.

This contract is referred to in the record as "Plaintiff's Exhibit 3."

The Harmon Motor Car Company mentioned in said contract was supposed by the plaintiff in error, the Northwest Auto Company, to be a corporation, and the record shows that there had formerly been a corporation known as the McKenna-Harmon Company (48). Mr. McKenna afterwards retired and it was sought to change the name of the company to the Harmon Motor Car Company, and papers seem to have been prepared with that end in view; but such consummation seems never to have been brought about, owing to the fact that the papers were never legally filed. The business, however, of what had formerly been the McKenna-Harmon Company continued to be transacted under the name of the Harmon Motor Car Company.

As above stated, the plaintiff in error assumed,



in dealing with the Harmon Motor Car Company that it was a corporation, and that F. E. Harmon was the President and General Manager of the same and it was in full reliance upon F. E. Harmon individually having full control of the management and operation of said business that said contract was entered into. No negotiations were had with any person in connection with said contract other than F. E. Harmon. If the Harmon Motor Car Company was not a corporation under the facts as they existed, then the Harmon Motor Car Company was, so far as the plaintiff in error was concerned, merely the trade name of F. E. Harmon.

After the execution of said contract and the said F. E. Harmon, so trading as the Harmon Motor Car Company, had entered upon the performance of the same, and in the month of January, 1915, the plaintiff in error became advised that the said Harmon was drinking intoxicating liquors to excess and was neglecting the business of said Automobile Selling Agency, and was so conducting himself as would necessarily and eventually tend to bring the business of said agency and the standing of the Reo car into disrepute in the public mind in the City of Seattle and the ter-

ritory covered by said contract. About the first of February, 1916, the said Harmon was arrested and lodged in jail in the City of Seattle, charged with disorderly conduct and on February 2d, 1915, wired the President of the plaintiff in error, F. W. Vogler, as follows:

DEFENDANT'S EXHIBIT "B."

WESTERN UNION.

DAY LETTER.

1915, Feb. 2, P. M. 6.10.

Seattle, Wn. 1

F. W. VOGLER,

Northwest Auto or Residence,

Portland, Ore.

Will you come to Seattle tonight; am in serious trouble.

F. E. HARMON,

HARMON MOTOR CAR CO.

Upon the receipt of said telegram Mr. Vogler came to the City of Seattle, and there found said Harmon lodged in jail, charged with disorderly conduct. Mr. Vogler then visited Harmon's place of business and found the defendant in error in charge thereof, and then informed her that said contract would have to be terminated. Mr. Vogler also notified Mr. F. E. Harmon that, under the circumstances, the contract would have to be terminated (202-203). Some negotiations were apparently had with a view to defendant in error being permitted to conduct the business and to take over the contract on her own responsibility, and it seems that the

plaintiff in error would not have objected to this being done, provided the defendant in error could have made satisfactory financial arrangements to enable her to successfully carry out the provisions of the contract. Upon the trial, however, it developed that during the period above referred to, that is the early part of 1915, the Harmons had been having some domestic disagreements and that at the very time of the culmination of F. E. Harmon's troubles, as above recited, and as a result thereof, an assignment had been executed by him to his wife, the defendant in error herein, whereby he undertook to transfer and set over to her all his interest in the business, and everything connected with the business, which would, of course, include the contract with the plaintiff in error.

After spending several days in Seattle Mr. Vogler became convinced that suitable arrangements would not be made for the defendant in error to take over the contract and conduct the business and that said Harmon Motor Car Company was at said time practically insolvent financially and without any means whatsoever to engage in or conduct the business successfully, and that unless outside means could be obtained other arrangements

would have to be made for the representation of the Reo car in Seattle. Mr. Vogler thereupon returned to Portland and on February 22d, 1915, addressed to the Harmon Motor Car Company at Seattle, Washington, the following communication, being plaintiff's Exhibit 8.

NORTHWEST AUTO CO., INC.

Portland, Ore., Feb. 22n, 1915.

*Registered.*

Harmon Motor Car Company,  
Seattle, Wash.

Gentlemen:

We herewith give you notice that we are obliged to cancel the contract covering the sale of REO cars and parts now existing between us. The factory advise that owing to the condition of affairs at present existing in Seattle, that for the best interests of all concerned, it is desirable that a change be made.

We will call your attention also to the clause attached to the contract regarding the payment of a certain note, which note has not been paid as agreed.

Under the circumstances, therefor, we will consider the contract cancelled ten days from today, as per clause No. 3 in same.

Yours very truly,

NORTHWEST AUTO COMPANY,

By W. J. H. CLARK,

Secy.

WJC E



On February 24th, 1915, Mr. Vogler received from the defendant in error a telegram as follows: (Defendant's Exhibit "A")

WESTERN UNION  
DAY LETTER.

Feb. 24, 1915. PM 2 56

Rx Seattle, Wn. 24.  
Mr. Fred Vogler,  
Care Northwest Auto Co.,  
Portland, Ore.

Am making arrangements with man of consideration means to go into partnership with me and put new money in the firm. Will change firm name and reorganize and carry on the business in a way that cant help but satisfy you. Do not make definite arrangements with anyone else until you hear my proposition. Can you come to Seattle? Rush answer.  
GERTRUDE HARMON.

This last communication was not, however, answered, because arrangements had meanwhile been made by the plaintiff in error for other representation.

About the first of February, 1916, the following assignment of all rights of action arising out of the transactions above referred to, was executed to the defendant in error, being Plaintiff's Exhibit 2.

## PLAINTIFF'S EXHIBIT "2"

For a valuable consideration, the undersigned hereby sell, assign, transfer and set over to G. M. Harmon, all their right, title and interest in and to any and all rights for damages, or cause or causes of action for damages arising out of that certain contract executed on the 17th day of October, 1914, by and between the Harmon Motor Car Company and the Northwest Auto Company, together with all their interest in and to any and all claims of whatsoever kind and nature which they have against the Northwest Auto Company.

Dated at Seattle, Washington, this 1st day of February, 1916.

McKENNA & HARMON,

By F. E. HARMON,

Its President.

HARMON MOTOR CAR CO.,

By F. E. HARMON,

Its President.

ATTEST: G. M. HARMON,

Its Secretary.

The defendant in error instituted suit against the plaintiff in error for the alleged wrongful cancellation of the contract, seeking to recover damages in the sum of \$13,727.10, as the amount of prospective profits, which could have been secured by the defendant in error had said contract not been cancelled. Trial was had to a jury and resulted in a verdict in favor of the defendant in error in the sum of \$13,727.10.

## ASSIGNMENT OF ERRORS.

### I.

The Court erred in permitting the witness Thornton to answer the following question:

“Q. Mr. Thornton, if deliveries had been made of cars as specified in this contract, Plaintiff’s Exhibit 3, as follows: October, 2; November, 1; December, 4; January, 8; February, 20; March, 20; April, 20; May, 15; and June, 10; if, I say, deliveries of cars had been made according to that schedule, how many cars could the Harmon Motor Car Company have disposed of before the expiration of this contract on the 31st day of July, 1915?”

The defendant objected to this question upon the ground that it called for a conclusion and the objection was overruled and defendant took exception. (330)

### II.

The Court erred in refusing to sustain defendant’s objection to permitting the witness F. E. Harmon to answer the following question:

“Q. Mr. Harmon, what, if anything, in addition to what you testified yesterday \* \* \* what condition, if any, in addition to what you suggested yesterday afternoon created a demand and a special demand for autos in the city of Seattle in the year, later part of the year, 1914 and 15?”

The defendant objected to this question being answered upon the ground of its being immaterial, and the objection being overruled exceptions were taken.

### III.

The Court erred in overruling the said witness’

answer to the question set out in assignment six, which answer was as follows:

“A. Well along with the other things I named yesterday, one thing in particular was the coming of jitney busses; that is the thing that brought out several hundred, a good hundred sales in the city of Seattle *along*, and the Reo car was a practical car for that because of its feature of being cheap in operation and such things as that and there were a good many Reos and such cars as that sold.”

The defendant moved to strike this answer out upon the ground that it was immaterial and the motion was denied and exception taken.

#### IV.

The Court erred in refusing to grant the defendant's motion for nonsuit. To which ruling the defendant took exception and exception was allowed. (331)

#### V.

The Court erred in refusing to permit the witness Vogler to answer the following question, when he was being examined as to what was the outcome of his going to a certain bank to make inquiries as to the financial standing of the Harmon Motor Car Company:

“Q. What was the result?”

To this ruling defendant duly objected and excepted.

#### VI.

The Court erred in refusing to permit the witness Albert Burke to answer the following question:

“Q. Well, what representations, if any, were made to you with reference to this being a new car?”



The answer to this question would have been that the Harmon Motor Car Company had sold to this witness a second-hand car representing that it was a new car. Objection to the answer having been sustained, the defendant excepted.

## VII.

The Court erred in striking the answer to the following question propounded to the witness Burke:

“Q. Why would you not have kept your contract with them?”

The plaintiff moved to strike this question because she contended that the contract did not provide for cancellation on such a contingency, the answer having been:

“A. Because the business relations weren't pleasant.”

To this ruling defendant excepted.

## VIII.

The Court erred in refusing to permit the witness Burke to answer the following question:

“Q. Well, what were the facts that caused you to cancel (332) this contract in addition to not having furnished you the cars?”

## IX.

The Court erred in refusing to permit the witness Burke to continue his answer to the following question:

“Q. Now, if I may, go on and state any further instances \* \* \*”

Mr. HALVERSTADT.—“We object to a general discourse to this answer.”

The COURT.—“Yes, I must sustain the objection, because we are not trying out the issues between the Harmon Motor Car Company and this witness; that’s a new issue entirely; that is not before the Court.”

Mr. IVEY.—“I would like to except, your Honor.”

The COURT.—“Noted.”

It being the contention of the defendant that this evidence was material.

### X.

The Court erred in granting plaintiff’s motion to strike out the testimony of the witness Clark as to the conditions existing which prevented the defendant from getting sufficient cars to fill its contracts, which said testimony is set out at page 242 of defendant’s proposed bill of exceptions; such testimony having been claimed by plaintiff to be self-serving and hearsay evidence. To this ruling the defendant excepted and exception allowed.

### XI.

The Court erred in refusing to permit the defendant to prove that the contract that was had by said witness Burke and the Harmon Motor Car Company was cancelled by the said witness for a good and sufficient reason, which ruling this defendant excepted. (333)

### XII.

The Court erred in refusing to give defendant’s proposed instruction No. 1 as follows:

“You are instructed that the defendant Company had a right under the terms of the contract in

question to cancel and rescind the contract that it had with the Harmon Motor Car Company, if the defendant F. E. Harmon conducted the business of the Company in such manner as to bring the Reo machine into disrepute and if you find from the evidence in this case that the said conduct was such as to bring about this disrepute then your verdict must be for the defendant."

To which defendant duly excepted and exception allowed.

### XIII.

The Court erred in refusing to give defendant's proposed instruction No. 2, as follows:

"You are instructed further that if you find that the Harmon Motor Car Company at any time between the first of October, 1914, and the 22d day of February, 1915, through F. E. Harmon, the husband of plaintiff in this case, was neglecting the business of selling Reo machines and that the said F. E. Harmon was conducting himself and the business of said agency so as to bring the Reo car into disrepute in the City of Seattle and the territory covered by said contract, the defendant had a right to cancel and rescind said contract, and your verdict must be for the defendant."

To which defendant duly excepted and exception was allowed.

### XIV.

The Court erred in refusing to give defendant's proposed instruction No. 3 as follows:

"You are instructed further that the contract in question is one of a personal nature and that the same could not be assigned by the Harmon Motor Car Company without the consent and approval

of the Northwest Auto Company and that any attempted assignment on the part of the Harmon Motor Car Company without this consent is void and of no effect."

To which defendant duly excepted and exception was allowed.

#### XV.

The Court erred in refusing to give defendant's proposed Instruction No. 4, as follows: (334)

"You are further instructed that if the said Harmon Motor Car Company, up to the time that said contract was cancelled by the defendant Company, was not properly promoting the sale of said Reo cars in the territory allotted to it by the contract, the said defendant Company had a right to cancel the said contract, and if you find from the evidence that the Harmon Motor Car Company during this period was not in fact properly promoting the sale of these cars, in all or any part of the territory allotted to it, then your verdict must be for the defendant."

To which defendant duly excepted and exception allowed.

#### XVI.

The Court erred in refusing to give defendant's proposed instruction No. 5, as follows:

"You are further instructed that the defendant had a right to cancel said contract for the failure of the Harmon Motor Car Company to pay that certain note described in said contract toward the end thereof, which said note was payable by the terms of said contract within thirty days from and after October 17th, 1914, and if you find that the



said Harmon Motor Car Company neither paid the said note within the said period of thirty days, nor within such additional time as was given to it by the defendant Company within which to pay the same, that said contract was subject to cancellation at the option of the defendant company, and your verdict must be for the defendant."

To which defendant duly excepted and exception was allowed.

## XVII.

The Court erred in refusing to give defendant's proposed instruction No. 6, as follows:

"You are further instructed that if you find that the defendant was not justified in cancelling the contract it had with the Harmon Motor Car Company, you are then to determine what damages, if any, the Harmon Motor Car Company suffered by reason of this cancellation and in determining these damages you must include only such damages as could have been reasonably contemplated by the defendant company when it terminated said contract, and you are instructed that the contract in question provides that the Harmon Motor Car Company should report at the end of each week to the seller all names and addresses of parties purchasing cars from the Harmon Motor Car Company during that week, together with the factory number of the car or cars sold, and that if any damages were sustained by the reason of such nondelivery of any such cars that were not thus reported prior to the date of cancellation of such contract, that such item of damages shall not be allowed; and in determining the damage that the said Harmon Motor Car Company sustained you will (335) have to consider not the gross profits that would have been made on the sale of

machines that the plaintiff claims were not delivered to this company, but only the net profits that would have been made."

To which the defendant duly excepted and exception was allowed.

### XVIII.

The Court erred in refusing to give defendant's proposed instruction No. 7, as follows:

"You are further instructed that the contract between the defendant and the Harmon Motor Car Company provided, among other things, that it was contingent upon delays due to strikes and other matters and that the shipment of the automobiles which the defendant was to furnish to the said Motor Car Company was subject to the prior orders of other dealers and was to be made as the business of the manufacturer would permit, and if you find that the plaintiff was entitled to damages against the defendant, you are to use as a basis of the number of machines that should have been furnished, that number which you find could have been furnished by the defendant under said contract, having due regard for the said provisions, and you are instructed that the said defendant by said contract did not agree to cause the manufacturer to do anything in particular, but it agreed to furnish the Harmon Motor Car Company the number of machines referred to in said contract subject to the conditions, among others, just mentioned."

To which the defendant duly excepted and exception was allowed.

### XVIII.

The Court erred when it gave the following instruction:

“The defendant could not simply move arbitrarily and simply take from the plaintiff the benefit which had already accrued and earned without compensating the plaintiff for such earning already made and practically terminated. In other words, the defendant could not under the terms of this contract cancel the contract after the plaintiff had sold a number of automobiles and had earned the money by reason of the provisions of the terms of this contract, without compensating the plaintiff for the earnings already made, etc.”

To which the defendant duly excepted and exception was allowed. (336)

### XIX.

The Court erred when it gave the following instruction:

“You are also instructed that the plaintiff would be entitled to recover for such sales as could have been made during the life of the contract, if the cars had been furnished, *it* you find from the evidence that it was reasonably certain that the sales could have been made and the profits could have been earned, but such profits from such sales must appear from the testimony to have been reasonably certain, etc.”

To which the defendant duly excepted and exception was allowed.

### XX.

The Court erred when it gave the following instruction:

“You are further instructed that the fact that this note attached to this contract provides that if the note was not paid within a given time that the contract should end, that under the testimony dis-

closed in this case, that provision of the note is waived \* \* \* and the Harmon Motor Car Company or the plaintiff in this case as the successor in interest of the Harmon Motor Car Company would have been entitled to reasonable notice and demand for the payment and afforded an opportunity of meeting the terms before being cut off in an arbitrary way."

To which the defendant duly excepted and exception was allowed.

## XXI.

The Court erred in instructing the jury as follows:

"You are instructed on terminating a relation existing between one party and another upon a given ground and for a stated reason, one may after the termination of that relation and suit has been instituted in the court to recover because of a wrongful termination of that relation, change his reason for terminating that relation. In other words, the defendant in this case could not terminate the contract in February for a stated reason, and now give another reason upon the trial of the cause for the cancellation of the contract. It is bound by the reason given in the letter at the time the contract was attempted to be cancelled, which is in evidence, because of any other reason, which may appear in the evidence may not be enforced."

To the giving of this instruction the defendant excepted and exception was allowed.

## XXII.

The Court erred in not granting the defendant a new trial, to which defendant duly excepted and exception was allowed. (337)



## XXIII.

The Court erred in making and entering the decree made and entered herein on or about the 1st day of September, 1917, because the verdict upon which the said decree was based was against the law, contrary thereto and excessive in amount, and because the jury, in arriving at their verdict, did not follow the instructions of the Court. The defendant excepted to the entering of this decree and the exception was allowed.

## ARGUMENT.

It is only on the theory that the contract involved was an assignable contract and that the defendant in error could have compelled the plaintiff in error to proceed with the contract after its assignment by F. E. Harmon of all his rights under the same to her that she could be allowed to recover prospective profits.

This contract, as stated in the beginning was entered into because the plaintiff in error was satisfied at the time with the personal characteristics of Mr. F. E. Harmon and his ability to successfully carry out the contract. The contract involved the personality of F. E. Harmon himself, and such contracts are not assignable.

*In Arkansas Valley Smelting Co. vs. Belden*

*Mining Co.*, 127 U. S. 379-387, Mr. Justice Gray said:

“At the present day, no doubt, an agreement to pay money or to deliver goods, may be assigned by the person to whom the money is paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him or by some other stipulation which manifests the intent of the parties that it shall not be assignable. But everyone has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his consent.”

“In the familiar phrase of Lord Denman: ‘You have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.’ ”

“Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such as the party whose agreement conferred those rights must have intended to be exercised only by him in whom he actually confided.”

Pollock on Contracts, 425.

“In *Lansden v. McCarthy* (1869) 45 Mo. 106, it was held that a written contract whereby one agreed to furnish a firm conducting a hotel with ‘all the fresh beef, pork and mutton that might be ordered and required by the said Bedard & Knickerbocker or their agents for the use and consumption of said hotel for the year then next ensuing, at ten cents per pound, Bedard & Knickerbocker on their part agreeing to pay for the meat so furnish-

ed promptly at the end of each successive month during the continuance of said contract,' could not be enforced by one who had become the proprietor of the hotel and had taken an assignment of the meat contract. The court said: 'The plaintiffs' counsel admit the proposition that where an executory contract is founded upon trust and confidence reposed in the character and skill of a particular person—as, where an author contracts to write a book, or an artist contracts to paint a picture—the contract is not assignable by the party in whom such trust and confidence is reposed. The principle involved in this concession is fatal to the plaintiffs' case; for the defendant's estimate of the solvency and pecuniary credit and standing of the plaintiffs' assignors may have constituted an important inducement to the contract, without which he never would have entered into it. There was a credit given. The meat was not to be paid for on delivery, but at the end of the successive months, involving credit to an indefinite amount. The amount of meat to be furnished any given month was not optional with the defendant but was to be determined by the hotel proprietors in view of the wants and convenience of the hotel. The contract imposed no obligation upon the defendant to accept as his debtors any other parties than those with whom he contracted. Nor was he under any obligations to experiment for a month and determine at the end of it whether he would go on with the contract according as he should or should not succeed in securing prompt payment. He was willing to give Bedard & Knickerbocker credit; but it does not thence follow that he was willing to give credit to the plaintiffs, even for a month or any part of it. Whether or not he would do so was a question for him alone to determine. He could not be forced into it against

his will by an assignment of the contract without his consent."

"Since brewing beer is a matter of skill and experience a contract between a brewery company and one to whom it leased a hotel and saloon, whereby the lessee agreed to purchase all of the beer sold during the term of the lease from the lessor Company, cannot be enforced by one who purchases the assets of the brewery company from its trustee in bankruptcy." *Jetter v. Scollan*, (1905) 48 Misc. 546; 96 N. Y. Supp. 274, affirmed in 114 App. Div. 902, 100 N. Y. Supp. 1122.

"And where an ice company had been dismissed by a customer because of dissatisfaction with its service, subsequently bought out a company of which the customer was then taking and delivered ice to him for a year without notifying him of the change of companies until the ice was consumed, it was held that the customer was not liable for the ice so supplied." *Boston Ice Co. v. Potter* (1877) 123 Mass. 28, 25 Am. Rep. 9. The court said:

"There was no privity of contract established between the plaintiff and the defendant, and without such privity the possession and use of the property will not support an implied assumpsit. *Hills v. Snell* (1870) 104 Mass 177, 6 Am. Rep. 216. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens Ice Company. Of this change he was entitled to be informed. A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract; as, when he



contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reason why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant before receiving the ice or before its delivery had received notice of the change and that the Citizens Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know.' "

In *Wheaton vs. Cadillac Automobile Company*, 106 N. W., 399, it is held that where a contract between a corporation and a partnership made the latter selling agent for the former, it being understood that one of the partners who was known to the corporation would use his personal efforts, a dissolution of the partnership authorized the corporation to abandon the contract, and the Court said:

"This is a suit brought by plaintiff for himself and as assignee of all the interest of his former partner, Stewart, in the business carried on by the co-partnership known as the New Jersey Automobile Company, to recover for the alleged breach of a contract to sell and deliver to plaintiff 50 automobiles, for which plaintiff claims to have placed an order which was accepted by defendant. It is not disputed that there was a contract between the parties,

but counsel disagree radically as to its character. Counsel for plaintiff insist that the contract is evidenced by the correspondence between the parties exclusively, and that it was primarily an agreement for the purchase and sale of personal property. On the other hand, counsel for defendant contend that the contract is to be derived from the correspondence and talks of the parties, and that the agreement was primarily for a selling agency in the State of New Jersey, involving the personal relationship of the parties. The partnership was dissolved, and Mr. Stewart retired from the firm before any automobiles were furnished. Mr. Metzger, at the time the contract was entered into, was sales agent for defendant, was well acquainted with Mr. Stewart, of the New Jersey Automobile Company, and had confidence in him as a salesman of automobiles. Metzger testified that he relied upon these qualifications in entering into the contract: 'In proposing the arrangement, I certainly relied upon Mr. Stewart being in the capacity of the salesman in handling the business \* \* \* I never knew Mr. Wheaton (before the agency was given). In fact, originally, I supposed we were dealing entirely with Mr. Stewart \* \* \* I, of course, expected Mr. Stewart to sell the goods, to maintain the agency, and employ competent help to assist him.' The circuit judge held that the defendant's construction of the contract was correct, and that 'the order for the 50 automobiles—the acceptance, if there is an acceptance by the Cadillac Company—is predicated upon the consideration that Mr. Stewart would use his personal efforts at least as a partner in the New Jersey Automobile Company, during the balance of the season, in the procurement of orders, and if that is so, gentlemen of the jury, upon the dissolution of that firm, one of the elements of consideration which

moved to the Cadillac Automobile Company was thenceforth lacking.' For this, among other reasons, the circuit judge directed a verdict for the defendant. We are of the same opinion as the circuit judge. The main purpose of the parties, as disclosed by this record, was, we think, the establishing of a selling agency in the New Jersey territory. The sale and delivery of machines to the agency so established was incidental to this main purpose. The contract was an entire one and indivisible, and not, as contended by plaintiff's counsel, separable into two distinct contracts, one for the establishment of an agency, and the other for the purchase of machines. Manifestly, the defendant was entitled, under such a contract, to the personal services of Mr. Stewart; and, having lost them by the dissolution of the partnership, it was entitled to abandon the contract."

If the contract were non-assignable certainly no claim for prospective profits could be maintained subsequent to the date of cancellation. The principal claim on the part of the defendant in error is for prospective profits. She claims that at the date of the cancellation 44 cars had already been sold, 41 to dealers in other counties and 3 individual sales in Seattle. (138-9)

Figuring the profit on these cars on the basis of the cost of the cars to the Harmon Motor Car Company at  $22\frac{1}{2}$  per cent discount from the list price of \$1050.00, plus freight each car would cost the Motor Company \$908.50. Figuring the freight and the

discount price which was allowed the various dealers would make a profit to the Harmon Motor Car Company of approximately \$3,000 for the 44 cars which were actually sold, or something over \$70.00 a car, including sales to agencies and individual sales. (138-9) Money was actually returned on only three cars sold individuals in Seattle. (120) Four cars were afterwards sold to an agency in Kittitas County by the successor of the Harmon Motor Car Company at a profit of \$315.00 for the four cars. Nine cars had already been delivered under the contract which would leave 43 cars to make up the balance of the cars required by the contract and the jury in this case found that the prospective profits on those 43 cars was upward of \$12,000.00, notwithstanding the profits on the 44 cars which had actually been agreed to be sold under contracts already executed amounted to approximately only \$3000.00.

Our understanding is that prospective profits cannot be allowed unless they are within the contemplation of the parties at the time the contract was entered into, and that only such profits as arise directly and necessarily out of the contract and not such as are incidentally or collaterally connected with it. The contract in this case provides that a



suitable salesroom and an efficient shop for the cars of the Reo Automobiles should be maintained, but did not provide that an extensive garage or a shop larger than the purposes contemplated by the contract itself demanded should be maintained, and that in case such collateral undertakings should be interfered with that the plaintiff in error could be held in damages by reason thereof.

The Harmon Motor Car Company had agencies for several other cars besides the Reo. It sold the Lozier, Interstate and Grant (55). The Reos in the previous years' business done by the Harmon Motor Car Company constituted approximately but one-third of the total sales made. At the beginning of 1915 the Harmon shop was a big shop, employing eighteen or nineteen men. (61) In figuring the profits on these 43 cars it was necessary, in order to get the figures arrived at in the verdict of the jury, to assume that every single car would be sold at retail in the City of Seattle, and in figuring the cost of selling the cars F. E. Harmon himself testified that the cost would be about \$6100.00 (177). He was then permitted to testify to a lot of items upon which this shop, employing eighteen or nineteen men, made a large profit and figured these profits

against the selling cost of the cars, or, in other words was permitted to reduce the selling cost of the cars by figuring the profits on the shop against the total selling cost, and he was thereby permitted to make a showing that the actual selling cost of the 43 cars would be but about \$3000. In other words defendant in error was permitted to charge the plaintiff in error with an element of profit in her business which could not possibly have been within the contemplation of the parties in entering into the contract. By this means plaintiff in error is mulcted in damages for the loss of profits of a concern which it never contemplated having anything to do with.

Another thing: The contract provided that the territory might be reapportioned at any time during the life of the contract if in the opinion of the seller the dealer was not properly promoting the sale of the Reo cars in all or any portion of the territory described in said contract.

The jury doubtless assumed that every single car uncontracted for would have been sold at retail, and doubtless overlooked the fact that the plaintiff in error had an absolute right to reapportion the territory at any time it deemed the actions of the dealer in not properly promoting the sale of Reo

cars justified such reapportionment. Further than this: The contract covers Whatcom, Skagit, Snohomish, Kittitas, Clallam, Jefferson, Kitsap, Island and San Juan Counties, and that part of King County lying north of Auburn in the State of Washington. No agency contracts had as yet been set up in either Jefferson, Kitsap, Island or San Juan Counties, and it is but fair to assume that had the contract been permitted to run to the date of its fixed termination, viz: July 31st, 1915, that agency contracts would have been placed in those counties and a reasonable number of cars sold therein, which would have been placed at a profit to the dealer similar approximately to that obtained in the other counties, and the profit on the 45 cars placed with agencies in the counties of Whatcom, Skagit, Snohomish, Kittitas and Clallam, as disclosed by the contracts themselves amounted to but slightly over \$2500.

Further, the contract provided that the shipment of the Reo Automobiles covered therein should be as the business of the manufacturer would permit. (See clause 10 of contract).

It was testified to, without contradiction, that not more than 45 or 50 cars could have been fur-

nished by the plaintiff in error subsequent to the termination of the contract had the contract not in fact been cancelled at that time. (246-7)

As has been shown, 44 of these cars were already contracted for at a profit fixed by the contracts themselves of approximately \$3000. This would have left practically no cars to have been sold at retail. Of course this is assuming that the number stated which could have been furnished after the termination of the contract was in fact all of the cars that could have been obtained from the manufacturer.

It seems to us that so far as the defendant in error having a right to introduce testimony to the effect that every car would have been sold at retail and that she was therefore entitled to her profit on each car upon the basis is concerned is analogous to the decision of the Oregon Supreme Court in the case of *McGinniss, Admr., vs. Studebaker Corporation*, 146 Pac., 825; 75 Ore., 519. This was the case of an automobile broker employed to sell cars on commission, and upon his employment being wrongfully terminated sought to recover as damages the profits which he might have made. It was held that although he had actually secured a list of prospects



at the time his employment was terminated, this fact did not entitle him to recover as damages the profits which he might have made had he sold them, since his ability to make the sales was merely speculation.

In the case at bar one of the witnesses for the defendant in error was propounded the following interrogatory:

“Q. Mr. Thornton, if deliveries had been made of cars as specified in this contract, Plaintiff’s Exhibit 3, as follows: October two, November one, December four, January eight, February twenty, March twenty, April twenty, May fifteen, June ten, if, I say, deliveries of cars had been made according to that schedule how many cars could the Harmon Motor Car Company have disposed of before the expiration of this contract on the 31st day of July, 1915?” (128)

Over the objection of the plaintiff in error he was permitted to answer and answered in substance that at least one hundred and twenty-five cars could have been disposed of. The contract only covered one hundred cars and the question propounded to the witness and his answer thereto was, under the circumstances, extremely prejudicial to the rights of the plaintiff in error. The error of the court in permitting this question to be answered in the manner in which it was and in permitting the answer to

stand, should alone justify the granting of a new trial. The jury could very easily have been misled by the answer into believing that the defendant in error was entitled to base her claim for prospective profits on the assumed sale of the one hundred and twenty-five cars; whereas, as we have stated, the contract called for but one hundred cars altogether. Eighteen of the forty-four cars, which the defendant in error claimed had been sold at the time the contract was cancelled were under contract to the Burke Motor Car Company at Everett and covering the territory of Snohomish County. At the time of the cancellation of the contract, Burke had already determined to abandon his contract with the Harmon Motor Car Company and to refuse to take any more cars from it for the reason that the business relations with the said Company had become very unpleasant and the Harmon Motor Car Company had endeavored to sell Burke a second-hand machine, representing the same as new. This testimony was certainly competent under the issues and the rejection thereof was error. The error was prejudicial to the rights of the plaintiff in error, and because the jury were permitted to figure the cars contracted to the Burke Motor Car Company as

sales already consummated, and if the Burke Motor Car Company would have refused to carry out its contract, as the witness Burke offered to testify, the sales of cars already made by the Harmon Motor Car Company would have been reduced by eighteen.

The Knutsen Brothers contract for Whatcom County, embracing eight cars, was not in writing (66) and was therefore not an enforceable contract, and the jury should have been so instructed.

The Nicholson Auto Company contract for Kittitas County embracing four cars, was not in writing at the time of the cancellation of the contract and was therefore not enforceable and should not have been allowed to stand as a consummated sale of said cars.

It is evident on the face of the record that the jury arrived at its verdict without any intelligent calculation as to the probable prospective profits based on any competent evidence introduced in the case and simply gave the defendant in error all that was asked for, the prayer of the complaint being for \$13,727.10 and the verdict of the jury being for exactly the same amount.

The defendant in error was apparently unable to support this verdict satisfactorily by any evi-

dence adduced in the case and voluntarily remitted therefrom the sum of \$893.95. We are unable to figure out upon what basis defendant in error made this remission. It is clearly indicated thereby that the defendant in error herself realized that the verdict was by said amount too great, and should be taken by the court as a conclusive indication that the verdict of the jury was extremely excessive.

We respectfully submit that the contract herein was not assignable and that when F. E. Harmon undertook to assign his interest in the same to the defendant in error and retire from said business, the plaintiff in error thereupon became entitled to abandon the contract and to make other arrangements for the sale of its cars in the territory covered by said contract. That no prospective profits should have been allowed after the date of said cancellation. In any event prospective profits on sales not made should be confined to somewhere near the profits on sales actually made under similar conditions. In which case the damages herein would be reduced at least half. Because of the extreme excessiveness of the verdict, if for no other reason, the judgment should be reversed.

Respectfully submitted.

KERR & McCORD,  
*Attorneys for Plaintiff In Error.*





IN THE

United States  
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHWEST AUTO COMPANY,  
a Corporation,  
*Plaintiff in Error,*

*vs.*

G. H. HARMON,  
*Defendant in Error.*

No. 3075.

Upon Writ of Error to the United States District Court  
for the Western District of Washington,  
Northern Division

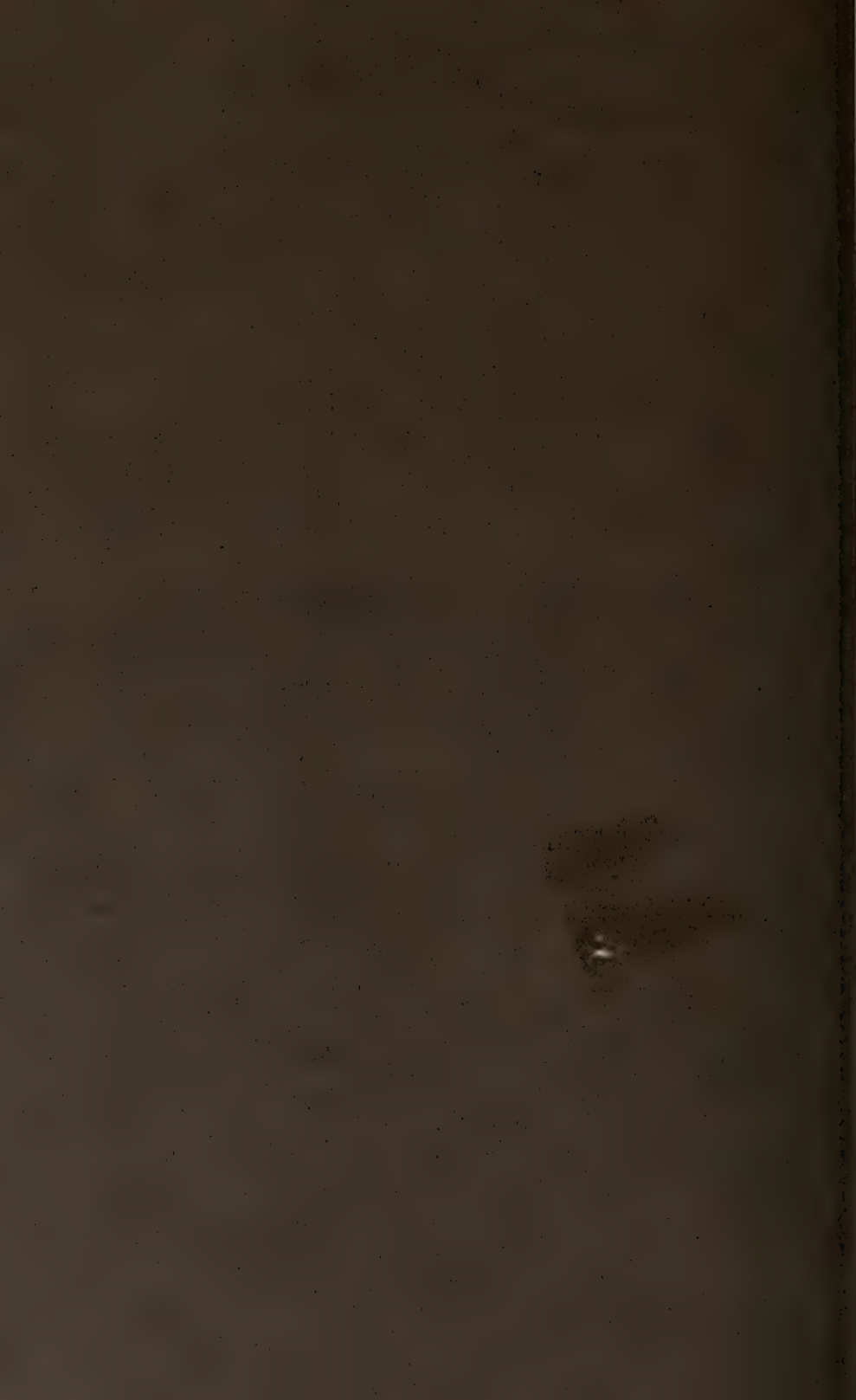
---

Brief of Defendant in Error

---

SAMUEL H. PILES,  
DALLAS V. HALVERSTADT,  
FRED H. LYSONS,  
*Attorneys for Defendant in Error.*

851 Stuart Building,  
Seattle, Washington.



IN THE

**United States  
Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

NORTHWEST AUTO COMPANY,  
a Corporation,  
*Plaintiff in Error,*

*vs.*

G. H. HARMON,  
*Defendant in Error.*

No. 3075.

Upon Writ of Error to the United States District Court  
for the Western District of Washington,  
Northern Division

**Brief of Defendant in Error**

SAMUEL H. PILES,  
DALLAS V. HALVERSTADT,  
FRED H. LYSONS,  
*Attorneys for Defendant in Error.*

851 Stuart Building,  
Seattle, Washington.





IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

NORTHWEST AUTO COMPANY,  
a Corporation,  
*Plaintiff in Error,*

*vs.*

G. H. HARMON,  
*Defendant in Error.*

---

No. 3075.

Upon Writ of Error to the United States District Court  
for the Western District of Washington,  
Northern Division

---

## Brief of Defendant in Error

---

### STATEMENT.

We believe that a very brief statement of the facts, supplemental to those appearing in the statement of plaintiff in error, will very materially aid the court in understanding the real controversy in

this case, and the limits of the inquiry open here. With that end in view we shall call attention to the issues attempted to be made by the answer of the plaintiff in error, and the evidence introduced on the trial of the action.

### PLEADINGS.

The defendant in error, in her complaint in this action, alleged in substance:

The corporate capacity of the defendant in error as an Oregon corporation; the fact that at all times mentioned in the complaint it was engaged in the sale of automobiles in the State of Washington; that on or about the 17th day of October, 1914, plaintiff in error entered into a contract with the Harmon Motor Car Company, a copy of which is attached to the complaint, marked Exhibit "A" and made a part thereof by appropriate reference, a copy of which contract appears in the brief of the plaintiff in error on page 27 thereof, this being the contract on which the action was founded; that relying on the contract, the Harmon Motor Car Company established certain distributing points, equipped a sales room, shop and garage, employed salesmen for the purpose of the sale, distribution, etc., of the automobiles, advertised such cars for sale, and in all

respects properly prepared to carry out its part of the contract, with the terms of which it in all respects complied; that on February 22, 1915, after delivering to the Harmon Motor Car Company but nine automobiles, plaintiff in error, without cause and without fault on the part of the Harmon Motor Car Company, breached said contract and notified it in writing that the contract was cancelled, and thereafter refused to deliver any more cars to it, a copy of the notice of cancellation being attached to the complaint, marked Exhibit "B" and by appropriate reference made a part thereof. (A copy of that notice appears on page 11 of the brief of the plaintiff in error.) That if the plaintiff in error had complied with the terms of the contract and had furnished the cars which by the terms of said contract it had agreed to sell and deliver to the Harmon Motor Car Company that company could and would have sold all of said cars at a profit and would have made a profit thereby of \$13,727.10 in which amount it was alleged the defendant in error was damaged by the action of the plaintiff in error; that on the 1st day of February, 1915, the Harmon Motor Car Company assigned and transferred to the defendant in error in writing all its right, title and interest in and to all claims of whatsoever nature it had in the plaintiff in error, including said cause of action, and



prayed for judgment in the sum of \$13,727.10 with costs and disbursements of the action. (2-4).

In its answer plaintiff in error, after admitting its corporate capacity, the execution and delivery of the contract as alleged, denied every other material allegation of the complaint, except that it delivered to the Harmon Motor Car Company, prior to February 22, 1915, eight of the automobiles it had contracted to sell to it. (16-18). By way of a first affirmative defense plaintiff in error alleged: That at the time it executed the contract in question F. E. Harmon represented that the Harmon Motor Car Company was a corporation, and that he was its president, but that subsequent to that time plaintiff in error ascertained that such company was merely a trade name under which said Harmon did business. (18). This allegation was denied by the defendant in error on information and belief. (22). In its first affirmative defense ~~defendant~~ <sup>plaintiff</sup> in error further alleged that by paragraph No. 3 of said written contract of sale the seller (plaintiff in error) reserved the right to reapportion the territory described in the contract at any time during the life of the contract, if, in the opinion of the seller the dealer (Harmon Motor Car Company) was not properly promoting the sale of Reo cars

in all or any part of the territory described in the contract, but should give at least ten days' notice of such reapportionment. (18). This allegation was admitted by the defendant in error in her reply. (22). Plaintiff in error further alleged as a part of its first affirmative defense that after said F. E. Harmon, trading as the Harmon Motor Car Company, had entered upon the performance of said contract, and in the month of January, 1915, plaintiff in error learned that Harmon was indulging in intoxicating liquors to excess, was neglecting the business of selling cars, was arrested, lodged in jail charged with "joy riding" and disorderly conduct, and wired to the president of the plaintiff in error at Portland, Oregon, to come to Seattle; that upon complying with the wire the president of the plaintiff in error found said Harmon in jail, charged with disorderly conduct; that defendant in error was in charge of the Harmon Motor Car Company at that time, and that he informed her that the contract would be terminated "as by its terms provided;" that defendant in error asserted that she could borrow the necessary money and could herself carry out the terms of the contract, but that upon inquiry it was ascertained that the said Harmon and the Harmon Motor Car Company were each wholly without credit and without any means what-

soever of carrying out or completing said contract; "that said F. E. Harmon had wholly failed to purchase cars as provided by paragraph 8 of said contract" and was in default in the payment of the note mentioned in the last clause of the contract of sale; that plaintiff in error cancelled the contract of sale after it had ascertained that neither the defendant in error nor the Harmon Motor Car Company had sufficient funds or credit to fulfill or carry out the contract after the defendant in error, on or about February 20, 1915, had advised it that she was unable to borrow any money or secure the means with which to carry out said contract, and further alleged:

"In this connection the defendant states to the court that had the plaintiff been able to secure the capital necessary to conduct the business and had she been able to have carried out said contract, this defendant would have been ready and willing to have had the same carried out by her as representing the said Harmon Motor Car Company; that this defendant only terminated said contract when finally informed that neither the plaintiff nor the Harmon Motor Car Company would be able to fulfill the contract or carry it out by its terms or otherwise." (18-20).

Replying to such allegations the defendant in error admitted that Harmon was lodged in jail in the City of Seattle on or about February 1, 1915,

and that he wired the president of the plaintiff in error to come to Seattle, but denied each and every other allegation. (22).

For a second affirmative defense, plaintiff in error plead the clause, attached to the contract of sale, referring to the payment of a note for \$2394.03, and alleged that said note had not been paid within the time therein limited, or at all, but was in considerable part long past due and wholly unpaid on the date of the notice of cancellation.

In her reply the defendant in error denied all of the above allegations as to the non-payment of the note. (22).

Plaintiff in error further alleged, as a part of its second affirmative defense, that after the lapse of ten days from the date of the service of its notice of termination the contract of sale was terminated and the territory therein described was reappportioned and assigned to other dealers in the City of Seattle (21); and in her reply the defendant in error admitted that said contract was terminated, but denied the other allegations. (23).

For an affirmative reply to said affirmative defenses the defendant in error alleged: That the note mentioned and described in the second affirma-



tive defense had been fully paid and that the payment thereof was accepted by the plaintiff in error as payment under the contract of sale. (23).

On the trial, after defendant in error had rested, plaintiff in error was permitted, over the objection of defendant in error, a trial amendment in the form of an additional affirmative defense, in which, in substance, it alleged: That it had not furnished to the Harmon Motor Car Company at the time the contract of sale was cancelled the number of cars required by the terms of said contract, but that during that period it had furnished all the cars it could procure from the manufacturers that were not allotted under contract to other agencies; that if the Harmon Motor Car Company had suffered damage by reason of not getting the entire number of cars it was through no default of plaintiff in error, but due to its inability to procure the cars, and that if the contract in question had not been cancelled by it, it would have been unable to furnish to the Harmon Motor Car Company the entire number of cars it had agreed to sell between the date of the cancellation of the contract and of its termination, because of its inability to procure the cars. (238-239). This affirmative matter was denied by defendant in error. (239).

## EVIDENCE.

We shall not set forth the evidence fully and in detail at this point, because it would involve repetition of the same when discussing the assignments of error argued by the plaintiff in error, and call attention to this fact at this time in order to prevent any impression on the part of the court that the evidence is all set forth in detail.

The Harmon company was required by the terms of the contract to deposit \$750.00 with the plaintiff in error as a guarantee for the satisfactory performance of the agreement. In fact, at the time the contract was cancelled the Harmon Company had \$1200.00, or \$450.00 more than the contract required, deposited with the company. (95, 234).

The Harmon Company had been in business two years prior to the execution of the contract sued on. (135). Its place of business was located at a prominent corner in the very center of the automobile district in Seattle, and one of the best, if not the best, corner in the city for an automobile agency. (51-52). The location of the building on the corner gave it two sides up and down two streets for half a block. (126). The building occupied by

it had been specially constructed for an automobile sale and display room. (136-137).

During the season of 1914 the Harmon Company had handled for the first time the Reo car and during that season had sold 56 Reos out of a total sale of 133 cars and trucks. (186).

After entering into this contract the Harmon Company had spent from \$1500 to \$2000 in advertising the Reo car, establishing new agencies and preparing to advantageously promote the sale of Reo cars during the season of 1915, the period covered by the contract. (51, 133).

The contract in question, in paragraph numbered 1, provided as to the payment of the machines "sight draft against bill of lading with exchange, unless otherwise agreed." This is the usual mode adopted everywhere for payment of automobiles by the retailer. (141). This mode of payment had been in force and effect in the previous purchase of automobiles by the Harmon Company, and had been in effect between the Harmon Company and the plaintiff in error during the season of 1914. (69, 70, 71, 141, 142). During the preceding year the Harmon Company had done its banking business at the Northern Bank & Trust Company, and such

drafts, when the company did not have sufficient funds of its own to pay them, were paid by it through The Northern Bank & Trust Company and this same arrangement was in effect between the bank and the Harmon Company for the season of 1915, (69, 70, 71, 72, 133, 141, 142), which arrangement was made for the balance of the season by defendant in error personally after she took exclusive charge. (71, 133, 304). The arrangement so made by the Harmon Company with the bank was entirely satisfactory to the plaintiff in error, because on February 15th, 1915, after the defendant in error had told Mr. Vogler, the president of the plaintiff in error, (76, 122, 198) all the facts, without reserve, (77) concerning the business and F. E. Harmon's retirement from the business, and after she had commenced to manage the same, plaintiff in error wrote to the Harmon Company a letter which shows its entire satisfaction with the arrangement. (Plaintiff's Exhibit 11). Thereafter, on February 19th, 1915, *three days before notice of the cancellation of the contract was given*, and as stated in said letter, plaintiff in error shipped four Reo cars to the Harmon Company with draft attached to bill of lading, through said bank, which draft was promptly paid, (67-70) as all drafts for machines



shipped to the Harmon Company theretofore had been promptly paid. (70, 141, 142).

Prior to the notice of cancellation of the contract the Harmon Company had sold 57 of the 100 cars which the plaintiff in error had agreed by the contract in question to sell to it, (138-14), and was then entering upon the best part of the season,—March, April, May and June,—for the sale of automobiles, these being the months in which the retail sales are principally made. (63, 64, 143). No complaint was ever made that the Harmon Company was not selling a sufficient number of cars. In fact, it sold the cars much faster than the plaintiff in error furnished them. (249). On this point the testimony of the witness Clark, the secretary of the plaintiff in error (230) is conclusive to the effect that the Harmon Company wanted all the cars the plaintiff in error could furnish it, and that no complaint was made that the Harmon Company was not taking all the cars plaintiff in error could give to it. (249). In fact, the Harmon Company, after the contract in question was entered into, repeatedly wrote and telephoned the plaintiff in error at Portland, to send all Reo cars it had, *regardless of their kind and to ship “all they could give us.”* (68, 130). Clark himself admitted that the Harmon

Company began asking for cars within thirty days after the contract was entered into, and that Mr. Thornton, on behalf of the Harmon Company, had telephoned him on two occasions, asking for cars, and that he, Clark, knew that the Harmon Company wanted all the cars plaintiff in error could give it. (248, 249). In fact, by the terms of the contract the Harmon Company had agreed to take, and was anxious to get, all of the 35 cars which were to be delivered monthly from October, 1914, to February, 1915, both inclusive. Plaintiff in error had shipped but nine cars (102) prior to the cancellation of the contract on February 22d, 1915. The Harmon Company had sold 57 of the 100 cars (105, 138, 140) and was then entering upon the very best part of the season,—March, April, May and June,—for the sale of automobiles, that is, the period in which retail sales are principally made. (63, 65, 143).

Although the Harmon Company had, prior to the real beginning of the automobile season, sold more than half of the cars which the plaintiff in error had agreed to sell and deliver to it, and although the Harmon Company had been repeatedly telephoning and writing to the plaintiff in error at Portland for cars, and to send it all the cars possible, irrespective of kind, on the 22d day of Feb-

ruary, 1915, the plaintiff in error, to the complete surprise of the defendant in error, (79) cancelled the contract of the Harmon Company, by means of a letter, a copy of which appears on page 11 of plaintiff in error's brief, and notified all the agents of the Harmon Company of that fact. (80). Notice of this cancellation came when the Harmon Company was about to make its big spring drive in the trade.

On February 5th, 1915, F. E. Harmon, theretofore the president of the Harmon Motor Car Company, assigned all his stock therein to the defendant in error, and thereupon severed all connection with the company. (121, 122). The defendant in error had been connected with the automobile business of the McKenna-Harmon Company and the Harmon Company since each commenced business in Seattle, the former in 1912, as secretary and treasurer of each company. She had devoted all her time, both in an administrative and an executive capacity to them and was fully acquainted with every phase of the business (46, 47) and was perfectly capable of conducting the same (303) and had engaged the witness, Thornton, who had theretofore been connected with the selling end of the Harmon Company

and who was familiar with its business as her sales manager. (91).

From the year 1912 to the latter part of February, 1915, the Harmon Company had built up a good business. (50). It took on the Reo and Lozier cars from the plaintiff in error in 1913, and sold 56 Reos during the year 1914 out of a total sale of 133 cars and trucks during that season. (186). It maintained a good service and repair department for the care of cars, as provided in Section 9 of the contract, which is a necessary and one of the biggest factors in the sale of cars (57); also a well equipped machine shop and garage, and employed at times from 18 to 19 men. (60, 61). It had established sub-agencies in Snohomish, Skagit, Whatcom and Clallam Counties for the sale of Reo cars. (64). Copies of the contracts for the sale of these cars had been sent to the plaintiff in error, and it knew these sales had been made. All of the cars having been shipped with sight draft attached to bill of lading to The Northern Bank & Trust Company, as had been previously done (140, 141, 142) defendant in error had previously arranged, upon her taking charge of the company, to have drafts for future business paid through such bank, pursuant to the assignment of February 5th, 1915. (71, 133,



304). *The only difficulty she had in running the business arose from the fact that the plaintiff in error did not furnish her sufficient cars to sell.* (73).

At the time F. E. Harmon assigned and transferred his stock in the Harmon Company to the defendant in error, he did so because she had laid all the facts concerning the relations between herself and her husband before Mr. Vogler, the president of the plaintiff in error (76, 122, 198) when he was in Seattle for approximately a week during the first week in February, 1915, (77), and this was done on the advice and instructions of Mr. Vogler. (122). She then advised Mr. Vogler that she had made the same arrangement with the bank that the Harmon Company had had with it the previous year, which arrangement she had personally made after she and her husband had separated, of which separation she had also advised the bank. (77, 78). *She had prior to the cancellation of the contract no intimation whatever that the same was to be cancelled.* (78, 79). She was unable to get cars after the delivery of February 19th, 1915, and by reason thereof was compelled to return deposits which purchasers had made on cars purchased by them. (80, 81).

At the time this contract was cancelled the automobile business was at its height and it was impossible for the defendant in error to secure another agency that was desirable and which would have been profitable (89) as it is very difficult to sell a car with which the public is not familiar, even though it be a good car, since introducing a new car required pioneering and building up. (90).

Defendant in error had had no relations with her husband after he severed his connection with the company, she having been, since the cancellation of the contract, which put her out of business, working as a stenographer, and had not lived with her husband since February, 1915. (306, 307).

On the trial of the action the plaintiff in error was permitted a trial amendment, as above suggested, in substance, to the effect that it had been unable to furnish the Harmon Company, prior to February 22d, 1915,—the date of the cancellation of the contract,—the cars which it had contracted to sell and deliver to it, because of its inability to secure them from the factory, and that if it had not cancelled the contract it would not have been able during the life of the contract to have furnished to the Harmon Company the cars which it had contracted to sell and deliver to it. This amendment

was made in an attempt to invoke the provision of paragraph numbered 10 of the contract. The proof is conclusive, as shown by the records of the plaintiff in error, which it was compelled to produce upon the trial, that prior to the execution and delivery of the contract in question, plaintiff in error had contracted to sell and deliver only 60 cars, (286-289), and that it had received from the factory 350 cars for sale and distribution by it, prior to the 31st day of July, the date of the expiration of the contract. (286-289). It thus appears that the plaintiff in error was furnished by the factory ~~320~~<sup>350</sup> cars which out of which it was compelled to deliver to the Harmon Company its 100 for the season of 1915; and this is conclusively the proof furnished by the records of the plaintiff in error.

The evidence is overwhelming that had the plaintiff in error not cancelled this contract the Harmon Company and the defendant in error would have sold all of these cars prior to the expiration of the contract and at a very great profit. We shall not attempt to detail the evidence in support of the above statement at this point, because so to do would involve its repetition under the discussion of the assignment of error questioning the amount of the

judgment, but shall detail the evidence in answering that discussion.

The jury to which the case was tried returned a verdict in favor of the defendant in error for \$13,727.10, and defendant in error, in order to remove any possibility of question, after calculating the expenses which she would have incurred in making sale of the cars which were unsold at the time the contract was cancelled at the highest amount shown by the testimony (that is, giving the plaintiff in error the benefit of any difference in figures) remitted \$983.95 and agreed to accept a judgment of \$12,743.15 with costs (36) for which sum judgment was entered in her favor, (39) after the court had denied a motion for a new trial. (38).

### ARGUMENT.

Although plaintiff in error has discussed the question of its right to cancel the contract only under the first assignment of error actually discussed by it, the brief seems to be written throughout on the assumption that the right to cancel existed. It will simplify matters greatly and, we believe, relieve the court of considerable investigation, if we may be permitted at this point to call attention to the facts and law showing that there



was neither right to cancel, nor grounds for cancellation of, the contract. And with that end in view we beg to call the court's attention to the following considerations:

The issues in this case are very greatly narrowed when it is borne in mind that the plaintiff in error gave written notice of the cancellation of the contract and in that written notice specified the reasons therefor, and the clause of the contract on which it was proceeding. The notice of cancellation is as follows:

NORTHWEST AUTO Co., Inc.

Portland, Ore., Feb. 22d, 1915.

*Registered.*

Harmon Motor Car Company,

Seattle, Wash.

Gentlemen:

We herewith give you notice that we are obliged to cancel the contract covering the sale of REO cars and parts now existing between us. The factory advise that owing to the condition of affairs at present existing in Seattle, that for the best interests of all concerned, it is desirable that a change be made.

We will call your attention also to the clause attached to the contract regarding the payment of a certain note, which note has not been paid as agreed.

Under the circumstances, therefore, we will consider the contract cancelled ten days from today, as per clause No. 3 in same.

Yours very truly,

NORTHWEST AUTO COMPANY

By W. J. H. CLARK,

WJC E.

Secy.

It will be observed from an examination of the contract, which was presented to the Harmon Company for signature, *with the preparation of which the Harmon Company had nothing to do*, (54, 137, 215), that the right to *cancel* the contract was reserved in but *two instances*. The first is contained in the last sentence of paragraph numbered 2, which contains a prohibition of sales of Reo cars outside of the territory described in the contract; and the second is contained in the last sentence of paragraph numbered 8 of the contract which required the Harmon Company to accept delivery of the cars according to the monthly schedule therein mentioned and furnish detailed specifications thirty days prior to the date of delivery mentioned, and in default thereof permitting plaintiff in error to deduct such cars from the total allotment and dispose of them as it might see fit, "or cancel this agreement at their election."

It will further be observed that when the plaintiff in error desired to reserve in the contract the right to *cancel* it, that right was reserved in express terms. It is familiar law that the mention of one is the exclusion of all others. And its application in this instance lies in the fact that having specifically provided the contingencies upon the happening of which it might *cancel* the contract, those instances are exclusive, and the right of cancellation exists in no other instance. Having clearly, therefore, reserved the right to cancel the contract in express terms, when it did reserve that right, it follows that the word "reapportion" cannot be given the meaning which the plaintiff in error now seeks to attribute to it.

The term "apportion" is defined in Webster's International Dictionary thus:

"Apportion—to divide and assign in just proportion; to divide and distribute proportionately; to portion out; to allot; to apportion undivided rights; to apportion time among various employments."

In the same authority the term "reapportion" is defined thus:

"Reapportion—to apportion again."

It is perfectly apparent from a moment's inspection of this clause of the contract that it was meant to apply to a situation in which it developed that the territory allotted to an agent under the contract was too large for him to cover, or where an agent was, without excuse, working only part of his territory. In other words it is perfectly apparent that what the plaintiff in error desired was to have all parts of the territory allotted worked as thoroughly as its ability to deliver machines would warrant. An attempt now made to assert that by virtue of its power to reapportion the territory in the event sales of Reo cars were not properly promoted is to make the clause apply to a situation utterly foreign to its real purpose. And above all, the fact must not be overlooked that when the plaintiff in error desired to reserve in the contract the right to *cancel* it, it reserved the right to "*cancel*" in express terms and by the use of that term and no other.

In this connection we urge the court to bear in mind a familiar rule of law, expressed thus by the Supreme Court of the United States:

"If there were any doubt as to the construction which should be given to the agreement of the intestate, that construction should



be adopted which would be more to the advantage of the defendant, upon the general ground that a party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him. \* \* \* *Noonan vs. Bradley*, 9 Wall., 394.

The same rule was expressed by the Supreme Court of Georgia in the case of *Buick Motor Company vs. Thompson* (Ga.) 75 S. E., 354, 356, as follows:

“It has been held that, where one of two parties prepares a written or printed contract and obtains the signature of the other party, if it contains ambiguous terms, and such ambiguity is not explained, the construction which goes most strongly against the party so preparing it will be generally preferred.”  
To the same effect see:

*Orient Mutual Ins. Co. vs. Wright*, 1 Wall., 456.

*Garrison vs. W. S.*, 7 Wall., 688.

*Moorfield vs. Inc. Co.*, (Ga.) 69 S. E. 119.

*Wier vs. Am. Locomotive Co.* (Mass.) 102 N. E. 481, 483.

The plaintiff in error contended that it had the right to cancel the contract of paragraph three thereof, which is as follows:

“The Seller reserves the right to reapportion this territory at any time during the life of this contract, if, in the opinion of the Seller, the Dealer is not properly promoting the sale of REO cars in all or any part of the above described territory, but shall give at least ten days’ notice of such reapportionment.”

It will be observed that nowhere in that paragraph is the right of cancellation given, but the sole right retained is to reapportion the territory at any time during the life of the contract if the dealer is not properly promoting the sale of Reo cars.

It stands without dispute that the Harmon Company had sold 57 of the 100 cars prior to the beginning of the real automobile season. It had established sub-agencies in the counties above mentioned. It had done everything that could possibly be done to “properly promote” and sale of Reo cars and the only reason under the shining sun why nothing more was done was because the plaintiff in error was not complying with its agreement as to delivery of cars to it. It paid for the cars shipped it on the spot; as above set forth there was no delay at any time in such payments; it had established a shop and salesroom, as provided by the contract, these being in the very center of the automobile dis-

trict, on a corner, and built expressly for that purpose; it maintained the very highest kind of service for its patrons; it even did the work required by patrons at night, if they desired it done. It not only repeatedly wrote, but telephoned, the plaintiff in error to send it *any* kind of Reo cars, irrespective of type, size, color, or anything else, and at the time the plaintiff in error cancelled the contract, under the provision of the contract permitting it to re-apportion the territory, if the Harmon Company was not properly promoting the sale of Reo cars it was because the Harmon Company had been brought to a standstill wholly and solely by reason of the fact that the plaintiff in error was not furnishing it cars for sale and delivery, knowing a fact, which has never been denied, that it is almost impossible to make retail sales if some reasonable delivery cannot be promised.

We submit that, if on such a record of accomplishment, if having done everything in its power to sell Reo cars, if having sold more than half its allotment prior to the beginning of the real automobile season, if having paid for the cars spot cash upon presentation of draft and bill of lading, and its further sales having been brought to a standstill because of the failure of the plaintiff in error

to make deliveries according to its agreement, the plaintiff in error may cancel the contract for alleged failure to properly promote the sale of Reo cars, then the law, the purpose of which is to compel justice and fair dealing between man and man in the performance of their obligations, has utterly failed in its purpose.

It is familiar law that where a party gives one reason for his conduct touching anything involved in a controversy, he cannot after litigation has arisen thereon change his ground and charge a different reason for his action.

*Ohio & M. Ry. Co.*, 6 Otto, 258.

*Goodman vs. Purnell*, 187 Fed. 90, 93.

*Polson Logging Co. vs. Neumeyer*, 229 Fed., 705.

*Davis R. B. & M. Co. vs. Dix*, 64 Fed. 400, 410.

*Oakland S. M. Co. vs. Wolf Co.*, 118 Fed., 239, 248.

*Single vs. Wilson*, (W. Va.) 80 S. E., 1108.

*Ginn vs. Clark Co.* (Mich.) 106 N. W. 867.

*Meineke vs. Falk* (Wis.) 21 N. W. 785.

*Ricketts vs. Buckstaff* (Neb.) 90 N. W. 915, 916.



In the case of *Ohio & M. Ry. Co. vs. McCarthy*, (*supra*) 6 Otto, 258, the Supreme Court of the United States said:

“Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.”

In its decision in the *Polson* case (*supra*) 229 Fed. 705, this court quoted with approval the rule laid down by the Supreme Court of the United States in the case last cited. It follows, therefore, that when the plaintiff in error sent its written notice of February 22d, 1915, cancelling the Harmon Company's contract, in which it states its reasons for its action and the provision of the contract upon which it was proceeding, it was thereby estopped to urge another or other ground for its action on the trial of this case.

Not having power to cancel the contract by virtue of a power to reapportion the territory, it remains to be seen what other reason was assigned by the plaintiff in error for its cancellation of the contract.

In the letter of cancellation of the contract in question, plaintiff in error called attention to the last clause of the contract regarding the payment of a note, and asserted that the note had not been paid "*as agreed*". We will assume, as correct, the most favorable construction of that clause that could be adopted, so far as concerns the plaintiff in error, that is, that thereby it was meant to be asserted that the note was not only not paid but that payment was not made in strict accordance with the terms of the note and contract, and that a default was thereby committed which justified the plaintiff in error in cancelling the contract.

In the first place, the testimony is ample that this note was fully paid prior to the notice of cancellation, and that prior to such notice it was understood by both Vogler and the defendant in error that it was paid in full. (73, 74, 75, 79, 93, 94, 96, 98, 101, 102). *Vogler did not deny that fact.*

The testimony is further without dispute that this note was paid by the Harmon Company in installments and was so accepted by the plaintiff in error as payment according to the contract. (Plaintiff's Exhibit 7, 76). The testimony also is to the effect that such payments were satisfactory. (76).

These letters clearly show that plaintiff in error in acknowledging receipt of partial payments upon the note was not insisting upon payment of the note according to the strict terms of the contract and note, and that these partial payments were satisfactory to it. Two principles of law foreclose this question against the plaintiff in error. First, forfeitures are not favored in law, and courts always incline against them.

*Phila. Ry. Co. vs. Howard*, 13 How. 307.

*Ins. Co. vs. Eggleston*, 96 U. S. 572.

*Knickerbocker Ins. Co. vs. Norton*, 96 U. S. 234.

*Wheeler vs. National Bank*, 96 U. S. 268.

*Henderson vs. Carbondale Coal Co.*, 140 U. S. 25.

*Iowa Ins. Co. vs. Lewis*, 187 U. S. 325.

*Batley vs. Dewalt*, 56 Wash., 431.

In the second place, it stands without question that these partial payments were accepted as payments on the note and according to the contract, that they were satisfactory to the plaintiff in error, and that at no time prior to the cancellation of the contract had any intimation whatever been given the defendant in error or the Harmon Company that a violation of the contract in that regard would

be claimed, or that a forfeiture of the contract was even within the realm of possibilities. Of course it stands without question that when these partial payments were accepted without objection and were satisfactory to the plaintiff in error, the Harmon Motor Car Company not only believed that the same were satisfactory but was justified in believing that no attempt would be made to forfeit the contract.

It is familiar law that provisions such as this can be waived, and whatever their form are waived, if payment not strictly according to the terms of the contract is accepted, and that after partial payments have been made and accepted default cannot thereafter be claimed until reasonable notice of an intention so to do has been given.

*Phoenix Mutual Life Ins. Co. vs. Doster*, 106 U. S., 30.

*Hartford Life & Annuity Ins. Co. vs. Unsell*, 144 U. S., 439.

*Jones vs. United States*, 96 U. S., 24.

*Knickerbocker Ins. Co. vs. Norton*, 96 U. S., 234.

*Ohio & Miss. Ry. Co. vs. McCarthy*, 96 U. S., 258.

*Iowa Life Ins. Co. vs. Lewis*, 187 U. S., 335.

*Thompson vs. Life Ins. Co.*, 104 U. S., 252.



*N. Y. Indians vs. United States*, 170 U. S., 1.  
*New Orleans vs. Texas &c. Ry. Co.*, 171 U. S., 312.

*Palatine Ins. Co. vs. Ewing*, 92 Fed., 111, 114.  
*Grigsby vs. Russell*, 222 U. S., 149.

*Brown vs. Guaranty &c. Co.*, 128 U. S., 403.  
*Pence vs. Langdon*, 99 U. S., 578.

1 *Veatch on Contracts*, §592.

*Scudder vs. Union National Bank*, 91 U. S., 406.

*Douglas vs. Hanburg*, 56 Wash., 63, 65.

*Walker vs. McMurchie*, 61 Wash., 489, 491.

*Shorett vs. Knudsen*, 74 Wash., 448, 450.

*Wright vs. C. S. Graves Land Co.*, (Wis.) 75 N. W., 1000.

*Tilden vs. Buffalo Office Bldg. Co.*, 50 N. Y. Supp. 511, 51.

In the case of *Phoenix Mutual Life Insurance Company vs. Doster* (*supra*) 106 U. S., 30, the Supreme Court of the United States approved the following instruction to the jury on a similar question:

“It said, in substance, that if the conduct of the company in dealing with the insured and others similarly situated had been such as to induce a belief on his part that so much of the contract as provides for a forfeiture, if the premium be not paid at the day, would not be enforced if payment were made within a reasonable period thereafter the Company ought

not, in common justice, be permitted to allege such forfeiture against one who acted upon that belief, and subsequently made or tendered the payment; and that if the acts creating such belief were done by the agent and subsequently approved by the company, either expressly or by receiving and retaining the premiums, with full knowledge of the circumstances, the same consequences should follow."

This rule has never been departed from by that court.

This court will observe that the twelfth clause of the contract in question is to the effect that the place of the performance of the agreement is Seattle, Washington. It is familiar law that, in the absence of an express stipulation to the contrary, the law of the place of the performance of a contract governs its construction and the rights of the parties thereunder. The Supreme Court of the State of Washington in the case of *Douglas vs Hamburg (supra)* 56 Wash., 63, 65, said:

"The rule is firmly established in this state, that where time is made of the essence of a contract of sale, the vendor may declare a forfeiture of the contract for non-payment of the purchase price or any installment thereof. *Drown vs. Ingels*, 3 Wash., 424, 28 Pac. 759; *Wilson vs. Morrell*, 5 Wash., 654, 32 Pac. 733; *Pease vs. Baxter*, 12 Wash., 567, 41 Pac. 899; *Jennings vs. Dexter Horton & Co.*, 43 Wash., 301, 86 Pac. 576. But the rule is

equally well established that the right of forfeiture must be clearly and unequivocally proved, and that the right may be waived by extending the time for payment, or by indulgences granted to the purchaser. *Whiting vs. Doughton*, 31 Wash., 327, 71 Pac. 1026; *Morgan vs. Northwestern Life Ins. Co.*, 42 Wash., 10, 84 Pac. 412; *Insurance Co. vs. Wolff*, 95 U. S. 326; *Insurance Co. vs. Eggleston*, 96 U. S. 572; *Orr vs. Zimmerman*, 63 Mo. 72; *Harris vs. Troup*, 8 Paige, 422; *Estell vs. Cole*, 62 Tex. 695; *Stewart vs. Gates*, 30 Miss. 100; *Watson vs. White*, 152 Ill. 364, 38 N. E. 902; *Monson vs. Bragdon*, 159 Ill. 61, 42 N. E., 383."

In the case of *Walker vs. McMurchie* (*supra*) 61 Wash. 489, 491, the same court said:

"And where a party to a contract waives a default in its terms as to payment, he cannot again establish his right to proceed strictly thereunder until he has given due notice of his intention to the other party. 29 *Am. & Eng. Enc. of Law* (2d ed.) 685; *Cole vs. Hines*, 81 Md. 476, 32 Atl. 196, 32 L. R. A. 455; *Watson vs. White*, 152 Ill. 364, 38 N. E. 902. Such is the announced rule in this court, *Douglas vs. Hanbury*, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. 1096."

In the case of *Shorett vs. Knudsen* (*supra*) 74 Wash., 448, 450, the same court said:

"He attempted to show that, some two years after the last payment was due, he demanded payment from the decedent and at the same time declared it forfeited. This he could

not do, notwithstanding time was of the essence of the contract. The vendor by extending the time of the payment and by indulgence to the vendee in this regard had waived this feature of the contract; and having done so he should not thereafter declare a forfeiture until after the demand for payment, and the lapse of a reasonable time. *Thomas vs. McCue*, 19 Wash., 287, 53 Pac. 161; *Whiting vs. Doughton*, 31 Wash. 327, 71 Pac. 1026; *Douglas vs. Hanbury*, 56 Wash. 63, 104 Pac. 1110; *Walker vs. McMurchie*, 61 Wash. 489, 112 Pac. 500."

It must be accepted, therefore, as a matter of fact and law, that the plaintiff in error could not cancel the contract after it had accepted partial payments in full of the note.

The third reason given by the plaintiff in error for the cancellation of the contract was: "Owing to the condition of affairs at present existing in Seattle," and "for the best interests of all concerned."

For the purpose of the argument we shall assume that everything except that relating to the financial condition of the Harmon Company, testified to on behalf of the plaintiff in error, was actual fact. There was no contention in the lower court, and there is none here, that full and complete knowledge of affairs as they existed was not fully placed before Vogler in Seattle in the first week of



February, 1915, or that full knowledge of the affairs was not obtained by him. In other words, there is no contention that subsequent to the notice of cancellation anything came to the attention of the plaintiff in error which would justify the cancellation of the contract.

In its answer, however, the plaintiff in error made this very full admission:

“In this connection the defendant states to the court that had the plaintiff been able to secure the capital necessary to conduct the business and had she been able to have carried out said contract, this defendant would have been ready and willing to have had the same carried out by her as representing the said Harmon Motor Car Company; that this defendant only terminated said contract when finally informed that neither the plaintiff nor the Harmon Motor Car Company would be able to fulfill the contract or carry it out by its terms or otherwise.”

The effect of this admission, *which has never been denied*, is that the plaintiff in error was perfectly willing to waive any and everything except the alleged inability of the defendant in error to secure the necessary finances to prosecute the work of the agency. That being the fact, it did not lie in the mouth of the witnesses on behalf of the plaintiff in error to complain of anything whatsoever re-

lating to the Harmon Company, except that which might relate to the financial condition of the Harmon Company. Good faith and fair dealing forever closed inquiry in those matters.

Of the financial condition of the Harmon Company no complaint whatever can be made. It is not disputed that all of the cars which were shipped *at any time* were paid for in spot cash. There is not a word of testimony to the contrary. The note mentioned in the clause added to the agency contract had been paid in full, and the testimony of Mrs. Harmon was that Vogler admitted that fact to her, *and Vogler, sitting in the court room, did not deny it.* The "parts account", that is the account for "Reo parts", was paid in full, except for the month of February, 1915, and the contract itself provides in paragraph numbered 5, that bills for parts are due and payable "on or before the 10th of the month following shipment."

There is not a particle of testimony concerning any obligation of any kind on the part of the Harmon Company, to any person, firm or corporation, other than the plaintiff in error, except a judgment in favor of the witness Thornton, which was rendered subsequent to the time the plaintiff in error put the Harmon Company out of business by rea-

son of the cancellation of the contract in question, (134) and its inability to secure another agency. In other words, the testimony is ample that the Harmon Company was able to pay spot cash for all the cars it could get. Arrangements to that effect had been made with the bank and had been acted under for more than a year theretofore and such arrangement had been continued in effect between the bank and the defendant in error after she took exclusive charge of the business. That such an arrangement was in force and effect is conclusively proven by the fact that less than one week prior to the date of cancellation of the contract the plaintiff in error wrote the Harmon Company that it was shipping it four Reo cars, and was drawing on it through The Northern Bank & Trust Company and the fact that when the cars came the drafts attached to the bill of lading were paid spot cash, and the further fact *that there is nowhere a denial thereof.*

On page 12 of its brief plaintiff in error seeks to make a point of a telegram sent it by the defendant in error on Febraury 24th, 1915—two days after the contract was cancelled—in which she speaks of the fact that a man of considerable means would go into partnership with her and put new money into the firm, seeking thereby to establish a right on the part of the plaintiff in error to cancel

the contract. In the first place, there was no lack of financial means on the part of the Harmon Company or the defendant in error; in the second place, if there had been, that fact would have given the plaintiff in error no right to *cancel the contract*, but would have given it the right to reapportion the territory, only in the event that lack of means was preventing the Harmon Company from “properly promoting the sale of Reo cars in all or any part of the above described territory,” as set forth in paragraph numbered 3 of the contract. Counsel for plaintiff in error asked her why she sent that telegram. The reason is very apparent. The Harmon Company had taken up the Reo—a very poorly represented agency—the preceding year (190....). Counsel further brought out the fact that she had put \$20,000 in the automobile business which had been lost during the two preceding years by reason of the failure of the two companies manufacturing the Interstate and Lozier cars (307); that after having built up the agency and made the wonderful showing of sales that the company had made at the date of the cancellation of the contract, she saw that, on top of that loss, the opportunity she had to get her money back being taken away, too, by the cancellation of the contract (307).



She further said:

“Well, when I got that letter cancelling my contract, I went through my brain to think of every reason on earth why Mr. Vogler would cancel my contract, whether they seemed reasonable to me or not; and I wrote him a telegram, too, immediately, to keep him from signing up anybody else until I could see him again.” (305, 306.)

We respectfully submit that defendant in error offered an explanation of that telegram, contrary to the inference which plaintiff in error sought to have the jury infer from it, which human experience, under the circumstances as they existed, will conclusively prove a fact.

We respectfully submit that on the facts there was at no time any ground for the cancellation of the contract, however strictly the contract might be construed with reference to the facts as they existed, or with reference to any contention by the plaintiff in error.

Plaintiff in error has assigned twenty-three errors, but has seen fit to discuss only six of them. This failure does not indicate supreme confidence in them. The principal assignment of error is to the effect that the contract in suit is one which is not assignable, and forces the position that the contract

was for the personal services of F. E. Harmon, the president of the Harmon Company.

In the first place we deem the assignment completely answered by the fact that there was no assignment by the Harmon Company of the contract in suit; it was of the stock of the company (121) and of the cause of action. In the next place, the plaintiff in error occupies an anomalous position. On page 7 of its brief it is asserted that plaintiff in error, at the time the contract in question was executed, believed that the Harmon Company was a corporation, and that F. E. Harmon so represented it, and then appears this:

“As above stated, the plaintiff in error assumed in dealing with the Harmon Motor Car Company that it was a corporation and that F. E. Harmon was the president and general manager of the same, and it was in full reliance upon F. E. Harmon individually having full control of the management and operation of said business that said contract was entered into.” (pp. 7-8.)

And on page 24 of the argument of the same assignment, plaintiff in error says:

“The contract involved the personality of F. E. Harmon himself, and such contracts are not assignable.”

These respective positions are utterly antagonistic. In the first place the court will observe that the contract was signed on behalf of the Harmon Company by F. E. Harmon as its president; in other words, that the contract was signed strictly as a corporation executes agreements. Nowhere in the contract is it provided that the management or services of F. E. Harmon shall be a condition of the contract; that the personality of F. E. Harmon is a part of the contract; or that a corporation, as the plaintiff in error asserts the Harmon Company was, could not, during the term of the contract, change any or all of its officers. It would be idle to contend that corporations having the power to change officers could not exercise it, after executing contracts containing no provision to the contrary. In the second place, it is nowhere contended in the pleadings or proof that the contract as executed was not the actual agreement between the parties, nor that a mistake was made in drawing the contract, or a false representation, knowingly made, to its damage. It stands, therefore, as the agreement between the parties, and is the measure of their rights and obligations. The personal services of F. E. Harmon not having been reserved by the contract, the Northwest Auto Company was not entitled to the same. Hence, when he severed his

connection with the Harmon Company, the legality of the contract between the plaintiff in error and the Harmon Company was not in the least affected, and no breach of the contract could possibly be claimed.

In order to sustain the assertion that it was entitled to the personal services of F. E. Harmon, plaintiff in error takes the position that the Harmon Company was a partnership. It has asserted in its pleadings, in its testimony and in its brief, that it dealt with the Harmon Company as a corporation, and always believed it to be such. It is difficult, therefore, to understand how plaintiff in error was concerned in the legal status of the Harmon Company when it did not in the contract reserve Harmon's personal services and the management of the company by him.

There is, however, another reason why this assignment of error is utterly unavailing. The McKenna-Harmon Company, as a corporation, began business in October, 1912. McKenna shortly thereafter sold his stock in the corporation to F. E. Harmon and the defendant in error. Thereafter, the necessary steps were taken to change the name of that corporation to that of the Harmon Motor Car Company. Papers therefor were executed and



left in the possession of an attorney to be filed, but the attorney neglected so to do, of which fact none of the contracting parties had knowledge until February, 1915, it being always theretofore supposed that the papers changing the corporate name had been filed as directed (136). The business was carried on after the change of name precisely as it was before (48, 49, 135, 136). On February 5th, 1915, F. E. Harmon sold all his stock in the McKenna-Harmon Company and the Harmon Company to the defendant in error (Plaintiff's Exhibit .....). The only affect which the assignments taken by the defendant in error had on either the McKenna-Harmon Company or the Harmon Company was to divest F. E. Harmon of the corporate stock of the companies and interest in the cause of action set up in this case. The parties having contracted and dealt with each other as corporations, and Vogler even so testified (209), each is estopped to deny the corporate existence of the other. Whether this question is to be resolved by the decision of the Supreme Court of the United States or the Supreme Court of the State of Washington is immaterial, because the same rule is applied by each court. In the case of *American Radiator Co. vs. Kinneear*, 56 Wash. 210, the Supreme Court of Washington adopted as the law of this state the

rule declared by the Supreme Court of the United States in *Whitney vs. Wyman*, 101 U. S. 392, in which last-named case it is said:

“It seems to us entirely clear that both parties understood and said that the contract was to be and in fact was with the corporations and not with the defendants individually. The agreement thus made could not afterwards be changed without the consent of the other.  
\* \* \* The corporations having assumed by entering into the contract to have the requisite power, both parties are estopped to deny it.”

In the case from which the above quotation is taken, it was claimed that a certain corporation contract was void, because entered into before the articles of association were filed, in violation of a statute, which is the precise question here. The same doctrine was applied in the case of *Ivy Press vs. McKechnie*, 86 Wash. 643.

This rule is supported by unanimous authority, and arose out of the principle of common honesty to the effect that when parties in good faith have dealt with each other as corporations each is thereafter forever estopped to deny the corporate capacity of the other.

In the case of *Ohio & M. Ry. Co. vs. McCarthy* (*supra*), 6 Otto, 258, the Supreme Court used an

expression which aptly fits the contention of the plaintiff in error in this regard. It said:

“This point was an afterthought, suggested by the pressure and emergencies of the case.”

There is no dispute that the necessary instruments were executed to change the name of the McKenna-Harmon Company to the Harmon Motor Car Company. There is no contention that the filing thereof was not directed, or that the parties all believed they had been actually filed, until they discovered the contrary in February, 1915. The testimony on these points being conclusive, and there being no contention to the contrary, the above mentioned general rule forecloses this contention against the plaintiff in error.

PROFITS ON SALES MADE AND WHICH  
WOULD HAVE BEEN MADE.

This question is discussed on pages 30-36 of the brief of the plaintiff in error. It stands without question that the Harmon Company had sold 57 out of the 100 cars. It stands without question that the real automobile season is the months of March, April, May and June (63, 64, 143), and that five times as many cars are sold during this period as during the preceding period of this contract (143).

The Harmon Company had been in business over two years prior to the execution and delivery of the contract in question (42). It had a salesroom and shop specially constructed for the purpose (137), in the very heart of the automobile district in Seattle (126, 137), and the building was located on a corner, giving it a commanding view of a half block each way on two streets (126). It maintained an excellent service department (56, 60, 61), in compliance with paragraph 9 of the contract, and even went so far as to do any work that came in at night if customers desired it (61, 62). The service maintained by an automobile agency is one of the most important features in the success or failure, of any agency (57). This was the condition of affairs prevailing with the Harmon Company at the time it took and entered upon the performance of the contract in question. Naturally the article which the Harmon Company had to sell is a very important matter. As to the desirability of the Reo car from every possible point of view, all of the parties are absolutely agreed. No one spoke more highly of it than did the plaintiff in error. In speaking of the 1915 Model (that being the model for the sale of which the contract in question was entered into), plaintiff in error wrote a number of letters, which



appear in the record as plaintiff's Exhibit 10, from which we make the following extracts:

In its letter of August 7th, 1914, attention is called to the fact that the price of the 1915 Model was lowered; but despite that fact, the car was being "constantly bettered." Speaking of an increased output of cars at the factory, it is said:

"That lowers the factory cost, as you know, and this saving is given to the agents and dealers, whom they realize helped to create *the wonderful demand made on Reo cars at this time.*"

Speaking of the demand for this car, the following is said:

"This coming season is going to be another Reo triumph, *particularly from an agency standpoint.*" (Italics ours.)

In the letter of November 28th, attention is called to the fact that the automobile-buying public had been clamoring for weeks and weeks for the announcement of the Rea car; and concerning the car the following was said:

"From our twelve years' experience in the handling of cars, we have never had the enthusiasm injected into us that these new models have done, and we are willing to stake our life on the fact that your verdict will be the same as ours, viz.: *the greatest value offered in any model of*

*of any made in the world today.*” (Italics ours.)

In its letter of December 8th, 1914, the plaintiff in error said:

“You are bound to catch a wave of approval when this nation-wide announcement is made. It is without question the most sensational ever brought before the automobile-buying public.

“Although our twelve years’ experience in the automobile business has made us more or less ‘case hardened,’ we must say we never had the enthusiasm injected into us that this new model has done.”

In its letter of December 15th, 1914, the plaintiff in error said:

“We believe that every prospect who reads this announcement will ‘get it in his blood.’ The specifications note many improvements. We are giving the public this year a real 18-carat article full jeweled—the kind that comes in a box. *We are giving greater value than ever before. We feel that no make in the country can produce their equal and offer them at the same price. A bold statement, but we can back it up.*” (Italics ours.)

In the letter of January 13th, 1915, after having actually operated the 1915 Model, the plaintiff in error said:

“We unloaded our first carload of REOS yesterday, and, believe me, Harmon, *they are some cars*. I had the pleasure of driving one of them up Portland Heights this morning, and *I can truthfully say that it shows about 25% more power than the 1914*. This, I know you will be glad to hear.

“*She is also a much easier-riding car than anything we have ever had before in this line*, owing to the longer wheel base and improved upholstery. The new Crown fenders and the one-man top certainly do set the car off, *and makes her look like \$2,000.00.*” (Italics ours.)

In the letter of January 23d, 1915, plaintiff in error said:

“You know we have two models in our line this year, both the Four and the Six. From what I have seen of them it is hard to distinguish which is the better car. *The Four is so much improved over last year that you would not know it, both in power and appearance—and better yet, in price.*” (Italics ours.)

In the letter of February 2d, 1915, the plaintiff in error sent to its agents a copy of a letter from Fosdick, an automobile company at Spokane, Washington, which is stated to be self-explanatory. The letter continues:

“This is the reason, gentlemen, that during the Show week which has just passed, we signed up more agents *and made more actual sales than any other three dealers combined*. Now

*this is a pretty broad statement, but we can prove it.*

“We have got the car this year, and it is up to you to get the orders. You will be enthused just as much as the Fosdick Auto Company after you have seen and tried out our new model.” (*Italics ours.*)

In the Fosdick letters the following appears:

“DEAR MR. VOLGER:

“The carload of Reos were unloaded Thursday, and they are sure some car this year, *all kinds of power on the hill*, and as you know we are in the midst of winter here now and the roads and streets are deep in snow, *making it the hardest kind of pulling, yet it does not seem to make any great amount of difference to the REO*; the lines of the car cannot be improved upon at all; the general equipment and appearance of the entire car is all or more than we could ask or expect; the price is right, and standing-up qualities need no comment, as they are long ago too well known. \* \* \* (*Italics ours.*)

In addition to the foregoing, counsel for plaintiff in error, on the trial of the case, in speaking of the 1915 Reo Model, said:

“We don’t dispute that that was a good, high-class car for that money. I don’t know that that question is at issue here in this case, at all. I don’t so understand it is. We certainly don’t deny it was a good car for the money.” (82.)



The 1914 Reo was a very high-class car (89); the 1915 Model a great improvement over the 1914 Model (88), and sold for \$200.00 less money (85, 127). The 1915 Model had a self-starter, had a longer wheel base, was an easier-riding car, was electrically equipped, had better lines, and was a more desirable car throughout than the 1914 Model (85-87, 125-132, 143-147); required small upkeep, gave elegant satisfaction and had a good reputation (143). The price is a material factor in the sale of cars (86, 127). The 1915 Model was a medium-priced car (86, 143). Its nearest competitors were the Buick, the Studebaker and the Overland (86, 126, 127), and the Reo, although a better car, cost \$200.00 less (86, 127). The principal competitor of the Reo was the Buick (86), and there was no competition with the Studebaker and the Overland. There was not a prettier car on the market than the 1915 Reo (129). There was a big demand for it and it was practically free from all trouble (129). It had plenty of power and stood up well (87, 143), and gave good satisfaction (88, 143), and *was one of the best medium-priced cars on the market* (85).

The 1915 models of medium-priced cars had, as above suggested, self-starters which made it possible for women to drive them, and the demand and mar-

ket for them was thereby very greatly increased (86, 87, 126, 145). That was the year when automobiles began to be generally used by business men in their business and this created an increased demand (145, 146). The fact that cars had theretofore sold for considerably more money than did the 1915 Reo very greatly increased the demand and market for the Reo, due to the fact that they were brought within the reach of a vast number of people who theretofore could not afford an automobile (87, 145). The jitney came into use in Seattle during that season, and this created an unusual demand for the 1915 car (150). The year 1915 was the greatest year known to the automobile business up to that time; *and sales of medium-priced cars during that year doubled (126, 145), and have practically doubled every year since that time (126, 145).* Every other dealer in automobiles during that year doubled his yearly sales theretofore, and there existed no reason why the Harmon Company could not have doubled its 1914 sales (129, 132).

*There was not in the lower court a single denial of any of the above facts. They stand admitted.*

The Harmon Company first took the Reo agency for the season of 1914. The Reo had been very

poorly represented in Seattle theretofore, nothing much had been done with it and the territory had not been looked after, and there had been very few cars placed in the territory or any work done to build up the agency (190). *This is not denied.* Despite that fact, the Harmon Company took the agency for the Reo car in 1914, under the above circumstances, and during that first year, although it had to spend a good deal of money to build up the agency (190); it sold fifty-six 1914 Reos (55, 186), and including other makes sold 133 in all (55, 186). The witness Thornton, sales manager for the Harmon Company (91), testified that customers for the car had been coming to the salesroom, unsolicited, inquiring for the car (129); that they could have sold twenty to twenty-five of the remaining forty-three cars at retail, right out of the shop, unsolicited (129); that they could easily have sold 125 cars, prior to the expiration of the contract in question (129). *These are facts, and stand undisputed; and the plaintiff in error did not offer or introduce a single bit of testimony in dispute of these facts.*

It must be borne in mind, in addition to all the above and foregoing, that the Harmon Company had the whole of King County, except the little town of Kent—that is, the most populous county, con-

taining the largest city, in the state, in which to sell at retail these forty-three Reo cars (64) during the very best portion of the automobile season—the period during which five times as many cars are sold as in the balance of the year (190).

It would be idle to contend that there is not, in these undisputed facts, substantial ground to justify the jury in finding that the cars could have been sold at retail prior to the expiration of the contract.

The next point argued, at page 31, is that prospective profits cannot be allowed unless they are within the contemplation of the parties at the time the contract was entered into, etc. This is not a correct statement of the rule of law, the rule being, as we understand it, that if the business of which the complaining party was deprived was contemplated, *or could reasonably be presumed* to have been contemplated, by the parties at the time of making the contract, and it is *reasonably* certain that a gain or benefit would have been derived, then such profits may be recovered. In the case at bar the contract shows on its face that the parties had in contemplation the making of profits; and if it does not it cannot be reasonably presumed that they had anything else in contemplation. Certainly



it was not contemplated that the Harmon Company was operating as a charitable institution.

The case of *McGinniss, Administrator, vs. Studebaker Corporation*, 140 Pac. (Ore.), 825, cited at page 25 of the opposing brief, recognizes our contention to be the correct one, and while a recovery was denied in that case to a salesman for prospective commissions, the court, at page 826, says:

“It should be remembered that the instant case is not analogous to that class of cases where there was an *exclusive agency for a definite period*, or where the agency covered a certain percentage of the entire output, because in such cases subsequent events generally afford an opportunity of showing whether sales would have been made.” (Italics ours).

This is the case of defendant in error, for here an exclusive agency for a definite time was created, and subsequent events and actual market conditions for the Reo cars at Seattle and in the territory defined conclusively show that all and more than 100 of the Reo cars could have been sold in the territory defined by the contract and within the time therein provided had the cars been furnished.

The correct measure of damages is laid down by the Supreme Court of the United States in

*Benjamin vs. Hillard*, 64 U. S. 149, where it is said:

“\* \* \* The principle thus laid down coincides with that in *Alder vs. Keighly*, 15 M. & W., 117. ‘No doubt,’ says the court in that case, ‘all questions of damages are, strictly speaking, for the jury; and however clear and plain may be the rule of law in which the damages are to be found, the act of finding them is for them; but there are certain established rules according to which they ought to find; and here is the clear rule: *That the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken.*’”

According to the undisputed testimony, the Harmon Company had actually sold 57 of the 100 cars which the plaintiff in error had contracted to sell and deliver to it, while plaintiff in error in fact delivered but nine of the 100 cars. It is difficult, therefore, to understand why the profits which would have been made on these 57 cars actually sold could not be recovered, as well as the profits on the remaining 43 cars.

In the case of *Anvil Mining Co. vs. Humble*, 153 U. S., 540, the plaintiff sued the mining company to recover damages for profits which would have been made had the contract not been wrongfully terminated. The quantity of mineral not

mined at the time of the termination of the contract and the cost to mine same was estimated by witnesses and submitted to a jury, and the Supreme Court, while admitting that there was no mathematical certainty either as to the amount of ore remaining in the mine or the cost to mine such ore, and that the testimony only furnished a basis for computing the profits lost, stated the following as a correct rule:

“Profits which are a mere matter of speculation cannot be made the basis of recovery in suits for breach of contract, while profits which *are reasonably certain may be*. And, as said by Mr. Justice Lamar in *Howard vs. Stilwell and B. M. Co.*, 139 U. S., 199: ‘But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to objection of uncertainty or of remoteness, *or where from the express or implied terms of the contract itself or the special circumstances under which it was made* it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.’” (Italics ours).

In *United States vs. Behan*, 110 U. S., 338, Behan filed suit in the Court of Claims for expenditures made and loss of profits on a Government

contract broken by the Government by ordering the discontinuance of the work. Behan failed to introduce any testimony as to whether he would have made any profits over and above his expenditures if he had completed the contract, and while the Supreme Court held it could not allow him for any loss of profits when such were not shown, it laid down the following rule:

“The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely—First, what he has already expended towards performance (less the value of materials on hand); Second, the profits he would realize by performing the whole contract. The second item, profit, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterton vs. Mayor of Brooklyn*, 7 Hill, 69, they are ‘*the direct and immediate fruits of the contract, they are free from this objection; they are then part and parcel of the contract itself entering into and in constituting a portion of its very element; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.*’ (Italics ours).



In the case of *Farmers Loan & Trust Company vs. Eaton*, 114 Fed., 14, 17, Eaton petitioned the court for relief for the termination of a lease of a line of railroad in the hands of a receiver which he had leased by consent of the court, upon the court's termination of such lease before the time when the same would expire, and sought recovery of profits. In discussing this question the court said:

“Counsel for appellant conceded that the basis adopted by the lower court for estimating the lessee's damages was as fair as could be adopted, but they contend broadly that the lessee was not entitled to any allowance for what he might have made by the operation of the road if he had been allowed to operate it during the residue of his term. They characterize such damages as speculative and not recoverable. We do not concur in that view. For the breach of such a contract as the one in question we do not perceive what damages could have been more direct and certain than the loss of the profits of operation. The lessee doubtless entered into the lease for the purpose of realizing something from the operation of the road over and above the expenses of running it and the rental. This expected profit was within the contemplation of the parties, and the ouster of the lessee necessarily deprived him of the expected gain. The most that can be said is that the amount of the profit which the lessee would have realized could not have been computed with mathematical accuracy. *The loss of this profit, however, was the natural and probable result of the ouster,*

*and the fact that the amount of the profit was not susceptible of mathematical demonstration, since the lessee had not been allowed to operate the road, did not render it so uncertain that it should have been excluded within the rule announced by this court in Trust Company vs. Clarke, 92 Fed., 293. (See also Guerini Stone Co. vs. Colan Const. Co., 240 U. S., 264, 280.) (Italics ours).*

In *Pennsylvania S. Co. vs. New York City Railway Company*, 198 Fed., 721, 745, the lessee of a certain part of a street railway in the hands of a receiver petitioned the court for damages for termination of its lease before the time of the expiration named therein, and the court, in allowing it damages for loss of profits, said:

“Manifestly the claimant was entitled to recover the value of its contract. Manifestly also the value of its contract was what it would have made by its performance. Gains prevented when fairly shown are recoverable as damages for breach of contract.”

These principles are clearly stated and the necessity for latitude in the reception of proof for damages is pointed out in the opinion of the New York Court of Appeals in *Workerman vs. Wheeler & Wilson Mfg. Co.*, 4 N. E. (N. Y.) 264, 266.

In the case of *Workerman vs. Wheeler & Wilson Mfg. Co.*, 4 N. E. (N. Y.) 264, 266, the Court of Appeals in New York says:

“It is not true that the loss of profits cannot be allowed as damages for breach of contract. Losses sustained and gains prevented are proper elements of damage. Most contracts are entered into with a view to future profits, and such profits are in the contemplation of the parties insofar as they can be properly proved, and they may form the measure of damages. *As they are prospective they must to a certain extent be uncertain and problematical*, and yet on that account a person complaining of a breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding its breach and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to rules of damages, to determine the compensation to be awarded for the breach.” (Italics ours).

In *Federal I. & B. B. Co. vs. Hopp*, 42 Wash., 668, 670, Hopp entered into a contract with the Federal Company, a manufacturer of brass beds, whereby he was given certain territory for a stated period in which to sell beds. He spent considerable money in establishing a market for the beds, but the company refused to furnish him beds when ordered by him during the life of the contract, and

in a suit by the company against Hopp for an unpaid balance of account for beds furnished him he counterclaimed for loss of profits owing to the wrongful termination of the contract, and in passing on the question as to his right of recovery, the court said:

“It is doubtless true that prospective profits are oftentimes speculative, indefinite and imaginary, but there is a reasonable certainty as to some future profit. There was nothing in the allegations of these answers stricken as aforesaid to indicate that they were all merely speculative and conjectural, or of a character incapable of enforcement. These may be of a substantial character in contemplation of law and such as the injured party would be entitled to recover from the party who had, without justification, broken the contract. Their recovery must, of course, be limited to the amount which from all the surrounding conditions may be deemed to have been reasonably certain had the breach not occurred.”

In *Church vs. Wilkeson-Tripp Company*, 58 Wash., 262, 271, Church sued the Wilkeson Company for the breach of a broker's contract to sell certain bonds of the company, and claimed that if the company had not failed and refused to deliver the bonds he could have sold the same, whereupon the court said:



*“When the direct purpose of the contract is to enable one of the parties to earn commissions or profits he is entitled to recover profits actually lost as his damages for the breach of the contract by the other party. As a condition precedent to recovery of damages for loss of contemplated profits it must, as a general rule, appear that such loss was reasonably certain and not a fictitious or imaginary one, and that fact being established the damages are to be ascertained by the jury, although not always capable of being precisely measured by that method of computation. \* \* \* The usual rule of excluding profits in estimating damages does not apply where the earnings of the profits is directly contemplated in the contract which has been breached.”* (Italics ours).

It cannot, therefore, be said in the case at bar that the profits sought to be recovered here were purely speculative or imaginary, when the uncontradicted evidence establishes the fact that more than 100 Reo cars could have been sold by the Harmon Company had plaintiff in error delivered same. The market was stable and certain in the territory allotted for such cars. It is clear from the evidence that the 100 cars, if delivered, could have been sold without the slightest difficulty, as there was a steady demand and an unfailing market for such cars. This is clearly demonstrated by the testimony of the plaintiff in error that it could not secure sufficient cars to meet the demand made upon it, which

testimony was given in an effort to show that its failure to furnish the cars in question was due to the inability of the factory to provide it with all cars needed to fill its contracts and orders entered into and received prior to the contract with the Harmon Company, as it expressly showed, by its own records, that it had received 290 cars which it was at liberty to have furnished the Harmon Company, because it had not previously contracted for said 290 cars. It was as easy, from the evidence, to sell these cars in the territory limited as it would have been to have disposed of a thousand barrels of sugar or a thousand sacks of coffee, which a wholesaler might have contracted to sell a retailer at the City of Seattle, and which he failed to deliver. And, as we have shown, the contract was entered into *for the direct purpose of allowing the Harmon Company to sell the cars at a profit over and above what it contracted to pay therefor*, the rule of excluding profits does not apply in the case at bar. One who prevents his contractor from performing his agreement is liable in damages for the profits which he would have made if he had performed it, *because such profits are the direct and immediate fruits of the contract which the parties necessarily contemplated, and in fact promised when the agreement was made.*

*Masterton vs. Mayor of Brooklyn*, 7 Hill, 61, 699.

*Railway Company vs. Howard*, 13 How., 307, 344.

*Mining Co. vs. Humble*, 153 U. S., 540.

and cases heretofore cited.

The plaintiff in error, as a dealer in these automobiles knew, when it made the contract, that the Harmon Company had entered into the agreement for the specific purpose of making a profit on each car furnished it, and it thereby promised the Harmon Company such profits, for nothing but a profit on the sales was in the contemplation of the parties.

*It should be borne in mind* that there was not the slightest contention in the court below, nor is there any such contention here that had the cars been furnished the Harmon Company could have sold them in the territory designated and within the time prescribed. It therefore stands admitted for the purpose of this case that the cars could have been sold. The only contention the plaintiff in error made that it had a right to breach the contract under the third provision thereof for reapportionment, and because it could not secure sufficient cars from the factory to meet contracts it had

entered into previous to the Harmon contract, and that defendant in error could not have made all the profits which she claims she could have made. In this view it is difficult to understand upon what theory it may be seriously argued that the prospective profits were not recoverable.

On page 32 of its brief counsel for plaintiff in error state that the Harmon Company had agencies for several other cars besides the Reo, that it sold the Lozier, Interstate and Grant. That agency was for the second year the company was in business. (55, 186). There was no contention in the lower court that it had any agency for the year 1915 except for the Reo, nor was there any dispute nor is there any now, that both the Lozier and Interstate Companies failed with a loss to the Harmon Company of approximately \$20,000. The cancellation of the contract in question put the Harmon Company out of business, because at that date it would have been utterly impossible for it to have gotten an agency for a known car, and unless a car is known it requires pioneering and is not profitable. (90). The cancellation of the contract also compelled the company to discontinue its shop, which had been profitable, because the shop alone could not possibly have been run with profit. (91).



On pages 30, 31 of its brief plaintiff in error seeks to cast suspicion upon the amount of the verdict by a statement that the sales of 43 cars had yielded a profit of approximately only \$3000.00 to the Harmon Company, seeking to cast doubt as to the ability of the company to have made a larger sum out of the sale of the cars unsold at the time of the cancellation of the contract.

If the court will refer to the contract in suit it will observe that the commission or profit made by the Harmon Company was  $22\frac{1}{2}$  per cent on the list price of cars, and if reference is made to plaintiff's Exhibits Nos. 4 and 5, which are the contracts of Knutzen Brothers and the Burke Motor Car Company it will observe that the Burke Company got a commission or profit of 20 per cent on the list price for the 20 cars it agreed to sell and that Knutzen Brothers got  $17\frac{1}{2}$  per cent on list price for the 12 cars mentioned in the contract, with a further provision that they should have 20 per cent on all cars sold if they purchased 20, which they later did. It thus appears that on 40 of the 43 cars mentioned by counsel the Harmon Company was making just  $21\frac{1}{2}$  per cent. On the other sub-agency contracts the sub-agents were to be paid 15 per cent of the list price on the cars, leaving the Harmon Company

but  $7\frac{1}{2}$  per cent. It thus is perfectly apparent why the Harmon Company would make very much less money on the 43 cars sold sub-agents than it would make on the 43 cars that it was expecting to sell at retail, when in those cases it was making  $22\frac{1}{2}$  per cent on the list price of the cars.

The list price of the cars appears on page 144 of the transcript of record and by reference to pages 155-184 it will be found that all of the facts, aside from the exhibits, appear which are necessary in order to compute the loss which the Harmon Company sustained.

The next point urged by the plaintiff in error is that testimony was admitted showing the profits which the Harmon Company would have made on the shop in carrying out the terms of this contract, complaining particularly because those profits were used to reduce the overhead expense of selling the cars. It will be observed that paragraph numbered 9 of the contract required the Harmon Company to maintain "an efficient shop" for the care of the automobiles. There is nothing in the contract requiring the company to maintain that shop and render service to customers at a loss, nor at cost, and nothing to prevent the company from maintaining such an efficient shop as would be a source of

profit. And if, in complying with the terms of the contract, the shop maintained by it was, through the manner of its conduct, a source of profit, certainly the plaintiff in error cannot complain. Its right to complain of the manner in which that provision of the contract was observed is limited to failure to maintain an "efficient shop." In making this contract the parties to it had in contemplation the making of profit, as most plainly appears from an inspection of the contract. And it does not lie in the mouth of a party who has deliberately breached such an agreement to urge that the profits which would have resulted had he not breached the agreement may not be recovered by the party whom he has wronged. Courts do not listen with favor to an argument which would encourage breaches of agreements and do not put a premium upon such breaches at the instance of the guilty party.

It is next urged that the jury in figuring the profit which the Harmon Company would have derived from the sale of the 43 machines not sold at the time of the cancellation of the contract must have assumed that everyone of those 43 cars would have been sold at retail in the City of Seattle. Counsel has overlooked the fact that the Harmon Company had for itself the whole of King County,

except the little town of Kent (64)—that is, the most populous County, containing the largest city, in the State of Washington. And in the face of the evidence as to the facilities maintained by the Harmon Company for selling the cars, the care the company took of its customers, the very high class car, its desirability, its satisfactory qualities, its low upkeep, its excellent quality, the fact that it had all known improvements, the fact that it cost the purchaser \$200.00 less than any car in its class, the abnormal demand for that character of car, in the Harmon Company's territory, during the life of the contract, the fact that sales of automobiles during the season of 1915 were double that of any other year, the fact that such sales have doubled each year since,—and these facts all stand admitted,—can it be said that there was no substantial evidence to justify the jury in believing that these cars could not all have been sold at retail? If there is such substantial evidence, that disposes of the question on this writ of error.

It is next urged that the jury overlooked the fact that plaintiff in error had the right to reappportion the Harmon Company's territory at any time that company was not "properly promoting the sale of Reo cars", calling attention to the fact that no



sub-agents had been secured in Jefferson, Kitsap, Island or San Juan Counties, and suggesting that it is fair to assume that if plaintiff in error had not cancelled the contract agency contracts would have been placed in these counties and a reasonable number of cars sold therein, with the result that the Harmon Company's profits would thereby have been reduced. Plaintiff in error cannot say that the Harmon Company was not properly promoting the sale of Reo cars when it had sold 57 of its 100 prior to the beginning of the real automobile season, when plaintiff in error was not furnishing it cars to sell, although even Clark, its secretary, testified that Thornton began telephoning for cars as early as the fall of 1914, (230, 248), and when the evidence was clear and conclusive that the Harmon Company repeatedly wrote and telephoned the plaintiff in error for cars (68, 130), and did not get them, particularly in view of the fact that Clark further testified that plaintiff in error was not complaining because the Harmon Company was not selling enough cars and that it sold more than the plaintiff in error furnished. (249).

Again, we ask whether there was any lack of substantial evidence showing that there existed no right to reapportion any of this territory, even

though the burden of proving cause for reapportionment of territory was on the plaintiff in error?

It is next urged that even if the contract had not been cancelled plaintiff in error could not have furnished to the Harmon Company more than 45 or 50 cars subsequent to the date of cancellation of the contract, and that by reason of that fact it was excused from performance by virtue of paragraph No. 10 of the contract, to the effect that shipment of cars covered by the contract should be made as specified in the contract, and "subject to the prior orders of other dealers and as the business of the manufacturer will permit." Prior to the making of the contract in question plaintiff in error had received orders from other dealers for but 60 cars, and received from the manufacturer prior to July 31st, 1915, 350 cars for distribution by it. (286-289). Hence, deducting prior orders, there remained 290 cars to deliver the 100 which plaintiff in error agreed to sell and deliver to the Harmon Company.

#### ERROR No. 1.

On page 36 of the brief it is urged that error was committed in permitting the witness Thornton to testify to the number of cars the Harmon Company could have sold during the life of the contract

had the same not been cancelled. The objection urged is that the witness being permitted to answer the question and having answered 125 cars, it was extremely prejudicial, because "the jury could very easily have been misled by the answer into believing that defendant in error was entitled to base her claim for prospective profits on the assumed sale of 125 cars; whereas, as we have stated, the contract called for but 100 cars altogether." The objection made to the question on the trial was in the following language:

"Object to that as calling for a conclusion of the witness. He may testify as to what contracts he had. I believe he has done that. And if we admit that those machines would be taken here the ground would be covered. I don't believe the witness is qualified to say what would have happened if something else had happened. I submit that to your Honor." (128).

We trust that the court will note the difference between the objection urged to the question on the trial and the complaint which is now made. So doing, the assignment is conclusively answered. But furthermore, we know of no rule of evidence or of law which prohibits a witness from testifying to what he believes to be the truth, when his judgment is properly invoked. It would be a strange rule which would permit him to testify that 100 cars

could have been sold but prohibit him from stating that 125 cars could be sold.

#### ERRORS NOS. VI-IX.

It is urged that Burke of the Burke Motor Car Company had cancelled his contract for purchase of 20 cars from the Harmon Company, that at the time of cancellation of the contract Burke had determined to abandon his contract and refused to take any more cars from the Harmon Company "for the reason that the business relations with said company had become very unpleasant and the Harmon Motor Car Company had attempted to sell Burke a second-hand machine, representing the same as new," complaining of the action of the court in refusing to admit testimony to that effect. Burke testified that the reason he cancelled his contract was because the Harmon Company's contract had been cancelled by the plaintiff in error and relations were not pleasant. (225, 227). We observe nothing in the Burke Motor Car Company's contract requiring, as a condition precedent to its remaining a binding obligation, continued pleasant relations between the parties to it. It would be a strange rule of law which would permit a party to a contract to refuse to perform it because his rela-



tions with the other party to the contract were not pleasant. Such a rule of law would make it impossible in every action involving damages for breach of a contract, for a court to enter judgment therefor against the defaulting party. Burke, however, testified that his company was financially able to carry out the contract (226) and we respectfully suggest that his right to terminate his contract was not at his pleasure.

On page 38 it is urged that the Knutzen Brothers and Nicholson Auto Company's contracts were not in writing, and the jury should have been so instructed. In the first place no requested instruction on that point appears. In the second place it is not assigned as error. In the third place the contention finds no support in law whatever. Otherwise damages for future profits in the sale of an article never could be adjudged.

Lastly, it is urged that the jury arrived at its verdict without any intelligent calculation as to the probable prospective profits and urges that this was so apparent that defendant in error remitted from the verdict \$893.95. The remission was made by calculating the expense of selling the 43 cars unsold at the highest figures of the witnesses on behalf of defendant in error. It is a significant fact that

counsel have not undertaken to point out any ground for the charge of lack of intelligent calculation on the part of the jury. The figures are in the record, as we have pointed out, and there appearing no show of error, or attempt to show error, there is nothing before the court.

The foregoing completes the discussion of all the alleged errors discussed by the plaintiff in error.

As we have hereinbefore called to attention, plaintiff in error has discussed but a few of its assignments of error. Those not discussed have doubtless been waived by it. If not, we suggest that a cursory examination will disclose their lack of merit, as, for example, assignments Numbered V and XXII. By the former, error is assigned in the ruling of the court sustaining an objection to a question concerning a conversation between Vogler and the president of The Northern Bank & Trust Company, had in the absence of the defendant in error, on the ground that it was hearsay (205). The identical testimony, given by the same witness, was later admitted by the court (280). By assignment No. XXII, error is predicated on the action of the court in not granting a new trial. On fundamental principles, this ruling is not subject to question in this court.

These two assignments are, we believe, illustrative of the assignments not discussed by the plaintiff in error. It not having discussed them, we shall not burden the court by so doing.

We respectfully submit that the judgment must be affirmed.

SAMUEL H. PILES,  
DALLAS V. HALVERSTADT,  
FRED H. LYSONS,  
*Attorneys for Defendant in Error.*

851 Stuart Building,  
Seattle, Washington.

No. 3075

---

United States  
Circuit Court of Appeals

For the Ninth Circuit. *10*

---

NORTHWEST AUTO COMPANY, a Corporation,  
Plaintiff in Error,  
vs.  
G. H. HARMON,  
Defendant in Error.

---

Transcript of Record.

---

Upon Writ of Error to the United States District Court of  
the Western District of Washington, Northern Division.

---

FILED  
DEC 17 1912  
U. S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

NORTHWEST AUTO COMPANY, a Corporation,  
Plaintiff in Error,  
vs.  
G. H. HARMON,  
Defendant in Error.

---

Transcript of Record.

---

Upon Writ of Error to the United States District Court of  
the Western District of Washington, Northern Division.

---



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Affidavit of D. V. Halverstadt in Support of Motion for Removal of Cause.....	12
Amended Reply .....	22
Answer ....	16
Assignment of Errors.....	334
Bond on Removal.....	9
Bond on Writ of Error.....	348
Certificate of Clerk U. S. District Court to Transcript of Record.....	356
Citation in Error.....	360
Complaint ....	2
Instructions of the Court.....	312
Judgment ....	39
Judgment ....	330
Motion for Extension of Time to File Bill of Exceptions ....	25
Motion for Judgment Non Obstante and in the Alternative for a New Trial.....	29
Names and Addresses of Counsel.....	1
Notice of Appearance.....	13
Notice of Motion for Removal of Cause.....	11
Opinion on Motion for Retrial.....	35
Order Allowing Writ of Error and Fixing Amount of Bond.....	346



Index.	Page
Order Denying Motion for Judgment Non Obstante Veredicto for New Trial.....	38
Order Directing Transmission of Original Exhibits to Appellate Court.....	350
Order Extending Time for Filing etc., of Proposed Bill of Exceptions.....	27
Order Extending Time for Transmission of Original Exhibits to Appellate Court.....	351
Order of Removal.....	15
Order Overruling Objections to Removal of Cause .....	14
Order Re Bill of Exceptions.....	40
Order Settling and Certifying Bill of Exceptions	43
Petition for Removal.....	6
Petition for Writ of Error.....	332
Proceedings Had June 21, 1917, 10 A. M.....	45
Receipt of Copy of Motion for Judgment Non Obstante, etc.....	34
Remission from Verdict.....	36
Stipulation Excluding Original Exhibits from Printed Transcript of Record.....	362
Stipulation Re Bill of Exceptions.....	42
Stipulation Re Extension of Time to File Proposed Bill of Exceptions.....	28
Stipulation Re Printing Transcript of Record..	353
Summons .....	5
 TESTIMONY ON BEHALF OF PLAINTIFF:	
CLARK, W. H.....	311
Recalled in Rebuttal .....	311
HARMON, F. E.....	134

Index.

Page

TESTIMONY ON BEHALF OF PLAIN-

TIFF—Continued:

Cross-examination ..... 184

Direct Examination ..... 194

Recalled in Rebuttal..... 298

Cross-examination .... 300

Redirect Examination ..... 302

Recross-examination ..... 302

HARMON, MRS. GERTRUDE..... 45

Cross-examination .... 94

Redirect Examination ..... 119

Recross-examination ..... 124

Recalled .... 195

Recalled in Rebuttal..... 303

Cross-examination ..... 307

Redirect Examination ..... 309

THORNTON, J. M..... 125

Recalled in Rebuttal..... 296

Cross-examination ..... 297

Redirect Examination ..... 297

WILSON, MISS HELENE H..... 295

In Rebuttal ..... 295

TESTIMONY ON BEHALF OF DEFEND-  
ANT:

BURKE, ALBERT ..... 218

Cross-examination .... 225

Redirect Examination ..... 226

Recross-examination .... 228

CLARK, W. J. H..... 230

Cross-examination ..... 248

	Index.	Page
TESTIMONY ON BEHALF OF DEFEND-		
ANT—Continued:		
Recalled . . . . .		267
Recalled—Cross-examination . . . . .		286
HARMON, F. E. . . . .		289
Cross-examination . . . . .		291
HARRISS, H. C. . . . .		281
SANDS, P. E. . . . .		255
Cross-examination . . . . .		263
Redirect Examination . . . . .		266
Recross-examination . . . . .		267
VOGLER, F. W. . . . .		197
Cross-examination . . . . .		209
Redirect Examination . . . . .		215
Recross-examination . . . . .		217
Recalled . . . . .		274
Cross-examination . . . . .		278
Recalled . . . . .		294
Cross-examination . . . . .		294
Verdict . . . . .		24
Writ of Error . . . . .		358

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Names and Addresses of Counsel.**

Messrs. KERR & McCORD, Attorneys for Defend-  
ant and Plaintiff in Error,  
1309-16 Hoge Building, Seattle, Washing-  
ton.

J. N. IVEY, Esq., Attorney for Defendant and  
Plaintiff in Error,  
13-9-16, Hoge Building, Seattle, Washing-  
ton.

Messrs. PILES & HALVERSTADT, Attorneys for  
Plaintiff and Defendant in Error,  
Suite 851, Stuart Building, Seattle, Wash-  
ington. [1\*]

---

\*Page-number appearing at foot of page of original certified Transcript  
of Record.

*In the Superior Court of the State of Washington,  
in and for King County.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO CO., a Corporation,

Defendant.

### **Complaint.**

Comes now the plaintiff, and for cause of action against the defendant, alleges:

#### **I.**

That the defendant Northwest Auto Co. is a corporation organized under the laws of the State of Oregon, and is, and was at all times hereinafter mentioned, engaged in the business of buying and selling automobiles in the State of Washington.

#### **II.**

That on the 17th day of October, 1914, the Harmon Motor Car Company and defendant entered into a contract in writing, a copy of which contract is hereto attached, marked Exhibit "A," and hereby referred to, and by such reference made a part hereof.

#### **III.**

That the Harmon Motor Car Company, relying upon such contract and believing that said contract would be complied with by defendant, established certain distributing points, equipped a garage and a shop for the care of the cars, employed certain persons to



assist in the sale, distribution and repair of said cars within the territory described in said contract, advertised such cars for sale, and were fully prepared to handle said cars in all respects as required by said contract. [2]

#### IV.

That the Harmon Motor Car Company has in all respects complied on its part with the terms of said contract, and has on its part performed all things required of it by said contract to be performed.

#### V.

That the defendant delivered to Harmon Motor Car Company 8 cars, and on the 22d day of February, 1915, without cause and without any fault on the part of this plaintiff, breached the said contract and notified Harmon Motor Car Company in writing that they elected to cancel said contract, a copy of which notice is hereto attached, marked Exhibit "B," and hereby referred to and by such reference made a part hereof, and that defendant has ever since said date refused to deliver any cars to the Harmon Motor Car Company, or comply in any way with the terms of said contract.

#### VI.

That had the defendant furnished cars to the Harmon Motor Car Company in accordance with its contract, the Harmon Motor Car Company could have sold all of said cars at a profit and could have made a profit on its said shop and garage so established in the sum of \$13,727.10. That by reason of the wrongful cancellation of said contract by the defendant the Harmon Motor Car Company has been damaged, as

aforesaid, in the sum of \$13,727.10.

VII.

That on the 1st day of February, 1916, by written assignment, the Harmon Motor Car Company sold, assigned and transferred to this plaintiff all its right, title and interest in and to all claims of whatsoever kind or nature that it had against this defendant, including this cause of action. [3]

WHEREFORE plaintiff prays that it have judgment against this defendant in the sum of \$13,727.10, together with its costs and disbursements herein.

HALVERSTADT & CLARKE,

Attorneys for Plaintiff.

State of Washington,  
County of King,—ss.

G. M. Harmon, being first duly sworn, on oath deposes and says: I am the plaintiff above named; I have read the foregoing Complaint, know the contents thereof, and believe the same to be true.

G. M. HARMON.

Subscribed and sworn to before me this 1st day of January, 1916.

DALLAS V. HALVERSTADT,

Notary Public in and for the State of Washington,  
Residing at Seattle.

[Endorsed]: Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. April 7, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy. [4]

*In the Superior Court of the State of Washington,  
in and for King County.*

No. 114,417.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO CO., a Corporation,

Defendant.

**Summons.**

The State of Washington, to Northwest Auto Co., a  
Corporation, Defendant:

You are hereby summoned to appear within  
twenty days after service of this Summons upon you,  
exclusive of the day of service, and defend the above-  
entitled action in the above-entitled court, answer the  
complaint of plaintiff, and serve a copy of your an-  
swer upon the undersigned attorneys for plaintiff  
at their offices below stated, and in case of your  
failure so to do, judgment will be rendered against  
you according to the demand of the complaint which  
will be filed with the clerk of said court, a copy of  
which is herewith served upon you.

HALVERSTADT & CLARKE,

Attorneys for Plaintiff.

Office and Postoffice Address: 405 Hoge Building,  
Seattle, King County, Washington.

Filed in the U. S. District Court, Western Dist. of  
Washington, Northern Division. April 7, 1916.  
Frank L. Crosby, Clerk. By E. M. L., Deputy. [5]

*In the Superior Court of the State of Washington,  
in and for the County of King.*

No. 114,417.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Petition for Removal.**

To the Honorable Superior Court of the State of  
Washington for King County:

Your petitioner respectfully shows this Honorable Court that the matter and amount in dispute in the above-entitled suit exceeds exclusive of interest and costs the sum or value of Three Thousand Dollars, and that the controversy in said suit is between citizens of different States. That your petitioner, the defendant in the above-entitled action, was at the time of the commencement of said suit and still is a citizen of the State of Oregon, and a resident of the city of Portland, State of Oregon, and a nonresident of the State of Washington and not a citizen of said States; that your petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and that its principal place of business is the city of Portland, in said State of Oregon, and that the plaintiff was at the time of the commencement of this action a resident of the county of King, State of Washington, and a citizen of said State.



Your petitioner offers herewith a good and sufficient surety for its entering into the District Court of the United States for the Western District of Washington, Northern Division, within thirty days from the date of the filing of this petition, a [6] certified copy of the record in this suit and for the paying of all costs that may be awarded by the said District Court, if said District Court shall hold that such suit was wrongfully or improperly removed thereto.

Your petitioner alleges that it has a good and meritorious defense in the above-entitled action.

Your petitioner prays this Honorable Court to proceed no further herein except to make an order of removal of its case as required by law and to accept the said surety bond and to cause the record herein to be removed to the District Court of the United States for the Western District of Washington, Northern Division, and it will ever pray.

KERR & McCORD,  
Attorneys for Petitioner. [7]

State of Washington,  
County of King,—ss.

J. A. Kerr, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant in the above-entitled action; that he has read the foregoing petition and knows the contents thereof and believes the same to be true; that he makes this verification for and on behalf of the defendant as its attorney, for the reason that the defendant is a nonresident of the State of Washington,



County of King, wherein affiant resides.

J. A. KERR.

Subscribed and sworn to before me this 15th day of March, A. D. 1916.

[Notarial Seal]

J. N. IVEY,

Notary Public in and for the State of Washington,  
Residing at Seattle.

State of Washington,  
County of King,—ss.

This is to certify that on this 15th day of March, A. D. 1916, before me, a notary public in and for the State of Washington, duly commissioned and sworn, personally appeared J. A. Kerr to me known to be one of the attorneys who executed the foregoing petition, and he then and there acknowledged to me that he executed the same for and on behalf of the petitioner Northwest Auto Company, a corporation, as one of its attorneys.

IN WITNESS WHEREOF, I have hereunto set my hand, affixed my official seal, the day and year first above written.

[Notarial Seal]

J. N. IVEY,

Notary Public in and for the State of Washington,  
Residing at Seattle.

Filed in clerk's office, Mar. 15, 1916. W. S. Sickles, Clerk. By O. S. Bruns, Deputy.

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 7, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy. [8]

*In the Superior Court of the State of Washington,  
in and for the County of King.*

No. 114,417.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Bond on Removal.**

KNOW ALL MEN BY THESE PRESENTS:  
That the Northwest Auto Company, a corporation, as principal, and New Amsterdam Casualty Company, a corporation of New York State as surety, are held and firmly bound unto G. M. Harmon, plaintiff, in the penal sum of Five Hundred (\$500.00) Dollars, for the payment of which well and truly to be made unto the said plaintiff, his heirs, representatives and assigns, they bind themselves, their successors or assigns, jointly and severally, firmly by these presents.

Upon condition, nevertheless, that the said Northwest Auto Company, a corporation, has petitioned the Superior Court of the State of Washington, for King County, for the removal of a certain cause therein pending wherein G. M. Harmon is plaintiff and the Northwest Auto Company is defendant, to the District Court of the United States for the Western District of Washington, Northern Division;

Now, therefore, if the said Northwest Auto Company, a corporation, shall enter into the said District

Court of the United States within thirty (30) days from the date of filing of said petition, a certified copy of the record in said suit and shall well and truly pay all costs that may be awarded by said District Court of the United States for the Western District of Washington, [9] Northern Division, if the said District Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void and of no effect; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said Northwest Auto Company, a corporation, has caused these presents to be executed and the said Surety Company has caused these presents to be executed by its duly authorized agent this 15th day of March, A. D. 1916.

NORTHWEST AUTO COMPANY, a Corp.

By KERR & McCORD,

Attorneys.

NEW AMSTERDAM CASUALTY COMPANY,

[Corporate Seal] By CARL M. BALLARD,

Its Agent and Attorney in Fact.

Filed in clerk's office, Mar. 15, 1916. W. K. Sickels, Clerk. By O. S. Bruns, Deputy.

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. April 7, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.  
[10]

*In the Superior Court of the State of Washington,  
in and for the County of King.*

No. 114,417.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Notice of Motion for Removal of Cause.**

To G. M. Harmon, Plaintiff, and to Messrs. Halverstadt & Clarke, His Attorneys:

You and each of you will please take notice that the defendant will on the 18th day of March, A. D. 1916, at the hour of 9:30 A. M., or as soon thereafter as counsel can be heard, move the Court for an order removing the above-entitled cause to the District Court of the United States for the Western District of Washington, Northern Division, in accordance with the petition and bond of the defendant, copy of which is herewith served upon you.

Dated March 15, 1916.

KERR & McCORD,  
Attorneys for Defendant.

Filed in clerk's office, Mar. 15, 1916. W. K. Sickels, Clerk. By O. S. Bruns, Deputy.

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. April 7, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.



*In the Superior Court of the State of Washington  
in and for King County.*

No. 114,417.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Affidavit of D. V. Halverstadt in Support of Motion  
for Removal of Cause.**

State of Washington,  
County of King,—ss.

D. V. Halverstadt, being first duly sworn, on oath deposes and says: I am one of the attorneys for the plaintiff above named, and have been such since the commencement of the above-entitled action. On the 14th day of March, 1910, Kerr & McCord, the attorneys for the defendant, served upon Halverstadt & Clarke, of which I am a member, and who are now and at all the times during the pendency of this action have been the attorneys for the plaintiff, an appearance in the above-entitled action, the original of which is hereto attached, marked Exhibit "A," hereby referred to, and by such reference made a part hereof as fully as though set forth at length herein. That the alleged petition, bond and notice of removal were not served upon by said firm until the 15th day of March, 1916, nor were they filed prior to that time.



This affidavit is made in opposition to the application of the defendant to remove said action to the United States District Court for the Western District of Washington, Northern Division.

D. V. HALVERSTADT.

Subscribed and sworn to before me this 16th day of March, 1916.

FRED G. CLARKE,

Notary Public in and for the State of Washington,  
Residing at Seattle.

Filed in the U. S. District Court, Western Dist.  
of Washington, Northern Division. April 7, 1916.  
Frank L. Crosby, Clerk. By E. M. L. Deputy.  
[12]

---

Recd. 3/13/16.

*In the Superior Court of the State of Washington  
in and for the County of King.*

No. ———.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Notice of Appearance.**

To Halverstadt & Clarke, Attorneys for Plaintiff.

PLEASE TAKE NOTICE that the undersigned hereby enter their appearance for the defendant above named.

KERR & McCORD,  
Attorneys for Defendant

Copy of within — received and due service thereof acknowledged this 17th day of March, 1916.

KERR & McCORD,

Attorneys for —.

Filed in clerk's office Mar. 18, 1916. W. K. Sickels, Clerk. By F. W. Smith, Deputy.

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. April 7, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.  
[13]

---

*In the Superior Court of the State of Washington  
for the County of King.*

No. 114,417.

Saturday, March 18, 1916.

Hon. J. T. RONALD, Judge.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO CO.,

Defendant.

**Order Overruling Objections to Removal of Cause.**

Order of removal to U. S. District Court signed.

Plaintiff's objections to entry of order overruled, and exceptions allowed.

Min. Book No. 1, page 395.

Filed in U. S. District Court, Western Dist. of Washington, Northern Division. April 7, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.  
[14]

---

*In the Superior Court of the State of Washington  
in and for the County of King.*

No. 114,417.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Order of Removal.**

This matter coming on for hearing on this 18th day of March, A. D. 1916, upon the petition of the above-named defendant, Northwest Auto Company, a corporation, to remove the above-entitled action from this Court to the District Court of the United States for the Western District of Washington, Northern Division, and it appearing to the Court that the above-named defendant has given due and legal notice of the filing of said petition and the bond on removal and the Court having found the said bond to be executed by good and sufficient surety in a sufficient sum and condition in the manner required by law, and it appearing to the Court that due and legal notice that this petition will be presented to this Court at this time was given said plaintiff, and the Court being now fully advised in the law and the facts, it is now

Ordered that the petition on file herein to remove the above-entitled cause from this Court to the District Court of the United States for the Western District of Washington, Northern Division, be, and the same is hereby accepted and the bond on removal on file herein be and the same is hereby approved, and it is further ordered that the clerk of this Court prepare and certify a copy of the record in the above-entitled action for transmission to the said District Court of the United States.

Done in open court this 18th day of March, 1916.

J. T. RONALD,

Judge.

Filed in open court Mar. 18, 1916. W. K. Sickels,  
Clerk. By G. B. Myers, Deputy.

Filed in the U. S. District Court, Western Dist.  
of Washington. April 7, 1916. Frank L. Crosby,  
Clerk. By E. M. L., Deputy. [15]

---

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 3,310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Answer.**

Comes now the defendant, Northwest Auto Com-

pany, and for answer to the complaint of the plaintiff alleges as follows:

I.

The defendant admits the allegations contained in paragraphs one and two of plaintiff's complaint.

II.

The defendant denies each and every allegation in paragraph three of plaintiff's complaint contained, except that the Harmon Motor Car Company had and maintained a place of business in the City of Seattle.

III.

The defendant denies each and every allegation contained in paragraph four of said complaint.

IV.

Answering paragraph five of said complaint this defendant admits that the Harmon Motor Car Company did purchase a few cars up to the 22d day of February, 1915, not exceeding eight, and denies each and every other and remaining allegation in said paragraph five contained. [17]

V.

Answering paragraph six of said complaint this defendant denies said paragraph and each and every allegation therein contained.

VI.

Answering paragraph seven of said complaint this defendant has neither knowledge nor information sufficient to enable it or its officers to form a belief as to the truth of the allegations therein contained, and therefore denies said paragraph and each and every allegation therein contained.



And in this connection the defendant denies that it is indebted to the plaintiff in the sum of \$13,727.10 or in any other sum or sums whatsoever.

For further answer and by way of a first affirmative defense to the matters and things set forth in plaintiff's complaint, this defendant says:

### I.

That at the time the contract, Exhibit "A" attached to plaintiff's complaint, was made and entered into by and between this answering defendant and Harmon Motor Car Company, the said F. E. Harmon who executed the contract for the Harmon Motor Car Company, as President, represented that the said Harmon Motor Car Company was a corporation, but that afterwards this defendant ascertained the fact to be that the Harmon Motor Car Company was a mere trader's name used by the said F. E. Harmon.

### II.

That it is specifically provided in said written contract, Exhibit "A," that: "3. The seller reserves the right to reapportion this territory at any time during the life of this contract, if, in the opinion of the seller, the dealer is not [18] properly protecting the sale of Reo Cars in all or any part of the above described territory, but shall give at least ten day's notice of such reapportionment."

### III.

That after the said F. E. Harmon, trading as Harmon Motor Car Company, had entered upon the performance of said contract, and in the month of January, 1915, the defendant learned that the said

Harmon was drinking intoxicating liquors in excess, was neglecting the business of his said agency and was so conducting himself and the business of said agency as to bring the Reo Car in disrepute in the city of Seattle and the territory covered by said contract; that on or about February 1st or 2d, 1915, the said Harmon was arrested and lodged in jail in the city of Seattle, charged with "joy-riding" and dishonorable conduct, and that on, to wit, February 2, 1915, the said Harmon wired the defendant's President, F. W. Vogler, as follows: "Will you come to Seattle to-night, am in serious trouble"; that Mr. Vogler came to the city of Seattle and there found the said Harmon lodged in jail, charged with disorderly conduct as aforesaid, and upon visiting his place of business found the plaintiff herein in charge thereof; that plaintiff was then informed by the said Vogler that the contract, Exhibit "A," would be terminated, as by its terms provided; that the plaintiff asserted that she could borrow the necessary money and could herself carry out the terms of the contract, and suggested to the said Vogler that she could borrow from her mother the sum of \$2,000.00 at least, for that purpose; that the said F. W. Vogler ascertained upon inquiry and charges the fact [19] to be that the said F. E. Harmon or Harmon Motor Car Company was wholly without credit or without any means whatever of carrying out and completing said contract; that the said F. E. Harmon had wholly failed to purchase cars, as provided by paragraph eight of said contract and was in default in the payment of the note referred to

in the last paragraph of said contract; that the defendant's president remained in the city of Seattle for some days, during which time the plaintiff herein professed to make an effort to raise the necessary money to satisfy the said Vogler, that she could herself assume and carry out each and every of the terms of said contract, and finally she, on or about February 20, 1915, informed the said Vogler that she was unable to borrow any money or secure the means with which to carry out said contract, and that thereupon the defendant gave notice of the termination of this contract, as set forth in Exhibit "B" attached to the complaint. In this connection the defendant states to the Court that had the plaintiff been able to secure the capital necessary to conduct the business and had she been able to have carried out said contract, this defendant would have been ready and willing to have had the same carried out by her as representing the said Harmon Motor Car Company; that this defendant only terminated said contract when finally informed that neither the plaintiff nor the Harmon Motor Car Company would be able to fulfill the contract or carry it out by its terms or otherwise.

Further answering said complaint and by way of a second affirmative defense to the matters and things therein alleged, defendant respectfully shows the Court: [20]

### I.

That said contract provided as follows: "It is agreed and understood that the attached contract will only be made good and expire on July 31, 1915,

provided a certain note amounting to twenty-three hundred and ninety-four and 03/100 (\$2,394.03) falling due in thirty (30) days from to-day, is paid promptly on the due date."

## II.

The defendant alleges that neither the said Harmon Motor Car Company nor the said F. E. Harmon paid said note within thirty days or at all, and that the said note was in considerable part long past due and wholly unpaid on, to wit, February 22, 1915, when Exhibit "B," said notice of termination, was by this defendant served on the Harmon Motor Car Company.

## III.

That after the lapse of ten days from the date of the service of said notice of termination, to wit, on or about March 4, 1915, the said contract was terminated and the said territory was by the defendant reapportioned and assigned to Messrs. Sharp & Leader, automobile dealers in the city of Seattle.

WHEREFORE, having fully answered the complaint of the plaintiff above named, the defendant prays that it be dismissed hence and that it have judgment against the plaintiff for its costs and disbursements herein.

KERR & McCORD,  
Attorneys for Defendant.

Copy of within Answer received and due service of same acknowledged this 3d day of May, 1916.

HALVERSTADT & CLARKE,  
Attorneys for Dft.



[Indorsed]: Answer. Filed in the U. S. Dist. Court, Western Dist. of Washington, Northern Division. May 3, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy. [21]

---

*In the District Court of the United States, for the  
Western District of Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO CO., a Corporation,

Defendant.

**Amended Reply.**

Comes now the plaintiff and for amended reply to the first affirmative defense, in defendant's answer contained, says:

I.

Replying to paragraph 1, plaintiff denies that she has knowledge or information sufficient to form a belief as to each and every allegation therein contained.

II.

Replying to paragraph 3, admits that F. E. Harmon was lodged in jail in the city of Seattle on or about February 1, 1915, admits that said Harmon wired to one F. W. Vogler to come to Seattle, and denies each and every other allegation in said paragraph contained.



Replying to the second affirmative defense in said answer, plaintiff says:

I.

Replying to paragraph 2, plaintiff denies each and every allegation in said paragraph contained.

II.

Replying to paragraph 3, plaintiff admits that defendant canceled the contract between defendant and Harmon Motor Car Company on or about the 4th day of March, 1915, and denies each and every other allegation in said paragraph contained. [22]

And for an affirmative reply, plaintiff alleges:

I.

That the note mentioned and described in the second affirmative defense in said complaint was fully paid, and the payment thereof was accepted by the defendant as payment under said contract, a copy of which is attached to plaintiff's complaint and marked Exhibit "A."

WHEREFORE, plaintiff prays as in her original complaint.

PILES & HALVERSTADT,  
Attorneys for Plaintiff.

State of Washington,  
County of King,—ss.

G. M. Harmon, being first duly sworn, on oath deposes and says: I am the plaintiff above named. I have read the foregoing Amended Reply, know the contents thereof, and believe the same to be true.

[Seal]

G. M. HARMON.

Subscribed and sworn to before me this 18th day of June, 1917.

DALLAS V. HALVERSTADT,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Copy of within Amended Reply received and service acknowledged this 18th day of June, 1917.

KERR & McCORD,  
Attorneys for Defendant.

[Indorsed]: Amended Reply. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 20, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [23]

---

*In the District Court of the United States for the  
Western District of Washington.*

No. 3310—L.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO CO., a Corporation,  
Defendant.

**Verdict.**

We, the jury in the above-entitled cause, find for the plaintiff, G. M. Harmon, and assess her damages in the sum of \$13,727.10.

J. W. HUPP,  
Foreman.

[Indorsed]: Verdict. Filed in the U. S. District Court, Western Dist., of Washington, Northern Di-

vision, June 26, 1917. Frank L. Crosby, Clerk. By  
Ed M. Lakin, Deputy. [24]

---

*In the Superior Court of the State of Washington,  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Motion for Extension of Time to File Bill of  
Exceptions.**

Comes now the above-named defendant and move  
the Court for an order extending the time within  
which the defendant shall be required to and may  
file its bill of exceptions herein, and granting to  
the defendant an extension of said time up to and  
including thirty days after the ruling of the Court  
upon defendant's motion for a new trial.

Dated this 3d day of July, 1917.

KERR & McCORD,  
Attorneys for Defendant.

State of Washington,  
County of King,—ss.

J. N. Ivey, being first duly sworn, upon oath de-  
poses and says:

That he is one of the attorneys for the defendant  
herein; that he has read the foregoing motion, knows  
the contents thereof and believes the same to be

meritorious and well founded in law. That it has been impossible since the trial of the above-entitled cause to have had prepared a complete bill of exceptions.

J. N. IVEY.

Subscribed and sworn to before me this the 3d day of July, 1917.

J. N. HAMILL,  
Notary Public in and for the State of Washington,  
Residing at Seattle. [25]

Copy of within motion received and due service of same acknowledged this 3d day of July, 1917.

PILES & HALVERSTADT,  
Attorneys for Plaintiff.

[Indorsed]: Motion. Filed in the U. S. District Court, Western Dist. of Washington, July 5, 1917. Frank L. Crosby, Clerk. S. E. Leitch, Deputy. [26]

---

*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Order Extending Time for Filing, etc., of Proposed  
Bill of Exceptions.**

This matter coming on regularly upon the motion of the above-named defendant for an order extending the time in which to file a Bill of Exceptions herein, and it appearing to the Court that the plaintiff has consented that sufficient notice of the time and place at which this motion is being presented has been given, and the Court being fully advised in the facts, the law and the premises, now therefore, it is hereby.

ORDERED, ADJUDGED AND DECREED that the time for filing and serving the proposed Bill of Exceptions on behalf of the defendant in the above-entitled action is hereby extended up to and including thirty days after the ruling of this Court upon the defendant's motion for a new trial in the above-entitled action.

Done in open court this 5th day of July, 1917.

JEREMIAH NETERER,

Judge.

The above order is hereby consented to this 5th day of July, 1917.

PILES & HALVERSTADT,

[Indorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington, July 5, 1917. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy.

[27]



*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Stipulation Re Extension of Time to File Proposed  
Bill of Exceptions.**

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys undersigned, that that certain motion for an order extending the time within which defendant may file and serve its proposed bill of exceptions, a copy of which motion has been received by plaintiff's attorneys, may be taken up for hearing at any time and place that the defendant may find the Honorable Judge Jeremiah Neterer, without further notice to plaintiff, provided, of course, said motion is taken up within ten days from the 26th day of June, 1917.

Dated July 5, 1917.

PILES & HALVERSTADT,  
Attorneys for Plaintiff.

KERR & McLEOD,  
Attorneys for Defendants.

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, July 5,

1917. Frank L. Crosby, Clerk. By S. E. Leitch,  
Deputy. [28]

---

*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Motion for Judgment Non Obstante and in the  
Alternative for a New Trial.**

Comes now the above-named defendant and moves the Court for a judgment in its favor notwithstanding the verdict of the jury, upon the ground and for the reason that the evidence introduced at the trial of said cause shows affirmatively that the plaintiff is not entitled to recover.

And in the alternative and in the event the Court should not grant the defendant's motion for judgment *non obstante*, then the defendant moves the Court for an order setting aside the verdict of the jury and granting it a new trial upon the following grounds and for the following reasons:

I.

Excessive damages appearing to have been given under the influence of passion and prejudice.

II.

Insufficiency of the evidence to justify the verdict.

## III.

Error of law occurring at the trial. [29]

The evidence shows that if the automobiles which the Harmon Motor Car Company claims to have sold had been delivered to the Harmon Motor Car Company at the time and in the manner specified by the contract had between this company and the defendant company, the only profits that would have been made on the cars thus claimed to have been sold would aggregate about ten to eleven hundred dollars, and that the profits that the Harmon Motor Car Company could reasonably have expected to make on the cars that it had not sold at the time the contract in question was cancelled would not have exceeded under any circumstances two or three thousand dollars.

The same state of facts shows an insufficiency of evidence to justify the verdict, and in addition thereto there was not sufficient evidence to justify the jury in finding that the cars that the plaintiff claims had been sold by the Harmon Motor Car Company had not in fact been sold, except possibly three of the same, and there was no evidence to justify the jury in finding the Harmon Motor Car Company could have sold the balance of the cars which it had contracted to receive from the defendant company.

Among the errors of law that occurred at the time of the trial of this action, there were the following:

(a) The refusal of the Court to grant defendant's motion for a nonsuit.

(b) Refusal of the Court to permit the defendant to prove by the witness Burke that the contract the plaintiff claimed the Harmon Motor Car Company had with the Burke Motor Car Company was in fact an enforceable contract, and in excluding the testimony of the witness Burke when the defendant undertook to prove by the said Burke that the contract that his company had with the Harmon Motor Car Company was and had been cancelled by Burke for good and sufficient reason. [30]

(c) The refusal of the Court to permit the defendant to prove by the witness Sands that the maximum profits that were made by dealers in automobiles in and about the city of Seattle for the past few years was about three per cent on the gross value of the business handled by such concerns.

(d) Failure of the Court to give defendant's proposed instruction No. 1.

(e) Failure of the Court to give defendant's proposed instruction No. 2.

(f) Failure of the Court to give defendant's proposed instruction No. 3.

(g) Failure of the Court to give defendant's proposed instruction No. 4.

(h) Failure of the Court to give defendant's proposed instruction No. 5.

(i) Failure of the Court to give defendant's proposed instruction No. 6.

(j) Failure of the Court to give defendant's proposed instruction No. 7.

(k) The giving by the Court of that instruction which reads as follows:



“The defendant could not simply move arbitrarily and simply take from the plaintiff the benefit which had already accrued and earned without compensating the plaintiff for such earning already made and practically terminated. In other words, the defendant could not under the terms of this contract cancel the contract after the plaintiff had sold a number of automobiles and had earned the money by reason of the provisions of the terms of this contract without compensating the plaintiff for the earnings already made, etc.”

which instruction was the substance of and related to the subject matter contained in plaintiff's proposed instruction No. 2.

(1) The giving of the instruction, which is as follows:

“You are also instructed that the plaintiff would be entitled to recover for such sales as could have been made during the life of the contract, if the cars had been furnished, if you find from the evidence that it was reasonably certain that the sales [31] could have been made and the profits could have been earned, but such profits from such sales must appear from the testimony to have been reasonably certain, etc.”

which said instruction ends with the clause “from that consideration,” and which said instruction was the substance of and covered the subject-matter referred to in plaintiff's instruction No. 3.



(m) The giving of the instruction that reads as follows:

“You are further instructed that the fact that this note attached to this contract provides that if the note was not paid within a given time that the contract should end, that under the testimony disclosed in this case that provision of the note is waived \* \* \* and the Harmon Motor Car Company, or the plaintiff in this case, as the successor in interest of the Harmon Motor Car Company, would have been entitled to reasonable notice and demand for the payment and afforded an opportunity of meeting the terms before being cut off in an arbitrary way,”

this being the substance of the matter referred to in plaintiff's proposed instruction No. 7.

(n) The giving of the instruction with reference to the defendant having assigned one reason at the time of giving notice of cancellation of the contract, and having urged another at the time of the trial, which instruction was the substance of plaintiff's proposed instruction No. 5.

KERR & McCORD,  
Attorneys for Defendant.

State of Washington,  
County of King,—ss.

J. N. Ivey, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant in the above-entitled cause; that he has read the foregoing motion, knows the contents

thereof and believes the same to be meritorious and well founded in law.

J. N. IVEY.

Subscribed and sworn to before me this 6th day of July, A. D. 1917.

[Seal]

J. N. HAMILL,

Notary Public in and for the State of Washington,  
Residing at Seattle. [32]

[Indorsed]: Motion for Judgment *Non Obstante* and in the Alternative for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 6, 1917. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [33]

---

*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Receipt of Copy of Motion for Judgment Non  
Obstante, etc.**

Receipt of motion for judgment *non obstante* and in the alternative for a new trial in the above-

entitled cause is hereby acknowledged on this 6th day of July, A. D. 1917.

PILES & HALVERSTADT,  
MILLER & LYSONS,

Attorneys for Plaintiff.

[Indorsed]: Acknowledgment of Service of Motion for Judgment Non Obstante and in the Alternative for a new Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 23, 1917. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [34]

---

*United States District Court, Western District of  
Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Opinion on Motion for Retrial.**

Filed August 4, 1917.

PILES & HALVERSTADT, for Plaintiff.

KERR & McCORD, for Defendant.

NETERER, District Judge:

The issues in this case were submitted to a jury, and a verdict returned by the jury in favor of the plaintiff. The defendant has moved for a new trial on various grounds. I have examined the record, and while the verdict may not be such a verdict as

the Court would return if submitted to it, yet the issues, I think, were fairly submitted to the jury. The jury has concluded with relation to the fact, and no error of law occurring upon the trial, the motion for new trial must be denied.

JEREMIAH NETERER,

Judge.

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Aug. 4, 1917. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [35]

---

*United States District Court, Western District of  
Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Remission from Verdict.**

Comes now, G. M. Harmon, the plaintiff above named, and hereby remits from the verdict in the above-entitled action the sum of \$983.95, and hereby agrees to accept, and does accept, a judgment on said verdict in the sum of \$12,743.15, and does hereby agree that when the same is paid it shall be in full payment and settlement of the cause of action in the above-entitled cause.

IN WITNESS WHEREOF, I have hereunto set my hand this 21st day of July, 1917.

G. M. HARMON,  
Plaintiff.

State of Washington,  
County of King,—ss.

This is to certify that on this 21st day of July, 1917, before me, the undersigned, a notary public in and for the State of Washington, duly commissioned, sworn and qualified, personally appeared G. M. Harmon, to me personally known to be the individual named in and who signed the foregoing instrument, and acknowledged to me that she signed and sealed the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and notarial seal, this the day and year in this certificate first above written. [36]

[Seal] DALLAS V. HALVERSTADT,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

[Indorsed]: Remission of Verdict. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Aug. 9, 1917. Frank L. Crosby, Clerk. By —————, Deputy. [37]



*United States District Court, Western District of  
Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Order Denying Motion for Judgment Non Obstante  
Veredicto for New Trial.**

This cause came on to be heard upon the motion of defendant for judgment *non obstante veredicto* and for a new trial, for reasons set forth in said motions, and was argued by counsel and submitted to the Court, and the Court being fully advised in the premises:

It is **HEREBY ORDERED, ADJUDGED AND DECREED** that said motions are, and each of them is, hereby denied, to which ruling of the Court the said defendant by its attorneys excepts.

Done in open court this 1st day of September, 1917.

JEREMIAH NETERER,

Judge.

Copy of within Order received and service acknowledged this 21st day of August, 1917.

KERR & McCORD,

Attorneys for Defendant.

[Indorsed]: Order Denying Motion for Judgment *Non Obstante Veredicto* for New Trial. Filed in the U. S. District Court, Western Dist. of Washing-

ton, Northern Division. Sep. 1, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [38]

---

*United States District Court, Western District of  
Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Judgment.**

This cause came on for trial before the Court and a jury on the 21st day of June, 1917, the plaintiff appearing in person, and by Piles & Halverstadt, and Miller & Lyson, her attorneys, the defendant appearing by its officers and by Kerr & McCord, and J. M. Ivey, its attorneys, and testimony in evidence on behalf of the parties having been offered and received by the Court, and said cause having been submitted to the jury under instructions of the Court, and said jury having returned a verdict in favor of the plaintiff in the sum of \$13,727.10, and the plaintiff having duly remitted from said verdict the sum of \$983.95, and the Court being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, G. M. Harmon, do have and recover from the Northwest Auto Company, a corporation, defendant above named, the sum of \$12,743.15, together with her costs and disbursements herein taxed at the sum of \$———, with in-

terest thereon at the rate of 6% per annum until paid, to which the defendant excepts and exception is allowed.

Done in open court this 1st day of September, 1917.

JEREMIAH NETERER,

Judge.

Copy of the within judgment received and service acknowledged this 21st day of August, 1917,

KERR & McCORD,

Attorneys for Defendant.

[Indorsed]: Judgment. Filed in the U. S. District Court, Western District of Washington, Northern Division. Sep. 1, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [39]

---

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Order Re Bill of Exceptions.**

This matter having come on regularly for hearing on this the 24th day of September, 1917, upon application of the respective parties to have the bill of exceptions herein settled, and both parties having duly received notice of the time and place for the

settling of the same, and it appearing to the Court that the defendant's proposed bill of exceptions was filed and served within the time heretofore granted the defendant within which to file and serve and the same, and it further appearing to the Court that the plaintiff's proposed amendments to the said bill of exceptions were duly served and filed and that the said amendments should be allowed, it is now by the Court:

ORDERED that the defendant incorporate in its proposed bill of exceptions the said proposed amendments of the plaintiff and that the bill of exceptions thus enlarged shall be and constitute the bill of exceptions in the above-entitled cause, and that the same thus enlarged shall be presented to this Court on the 28th day of September, 1917, at 2 o'clock P. M. for the purpose of certifying the same as such, and the time within which the same shall be certified as such is hereby extended up to and including the said 28th day of September, 1917.

Done in open court this 24th day of September 1917.

JEREMIAH NETERER,

Judge. [40]

[Indorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Sept. 24, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [41]



*In the District Court of the United States for  
the Western District of Washington, Northern  
Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Stipulation Re Bill of Exceptions.**

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys undersigned:

1st. That the defendant's proposed bill of exceptions was duly served and filed within the time provided by law and the extension thereof hereinbefore provided for, and that the plaintiff's proposed amendments to said bill of exceptions were duly and regularly served and filed within the time provided by law, and the extension hereinbefore provided for.

2d. It is further stipulated and agreed by and between the parties hereto that due notice was given to both parties that the Court would take up the matter of settlement of said bill of exceptions at the hour of two o'clock P. M. on the 24th day of September, 1917, and that the time within which the defendant shall have to enlarge the said bill of exceptions and have the same certified may be extended up to and including the 28th day of September, 1917, and that without further notice to either of the said parties, the same may be taken up by the Court at



two o'clock P. M. on the 28th day of September, 1917, for the purpose of having the same certified.

Dated this 10th day of September, 1917.

PILES & HALVERSTADT,

Attorneys for Plaintiff.

KERR & McCORD,

Attorneys for Defendant. [42]

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Sept. 28, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [43]

---

*In the District Court of the United States for  
the Western District of Washington, Northern  
Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Order Settling and Certifying Bill of Exceptions.**

This cause having been brought on regularly before the court this 28th day of September, A. D. 1917, at the hour of two o'clock P. M., upon the application of the parties hereto for the settling and certifying of the bill of exceptions lately filed herein, and the time of filing, settling and certifying said bill of exceptions having been duly extended by order of the Court and by stipulation of the parties until and including this day, and the parties having agreed

together to submit to the Court the proposed bill of exceptions and the proposed amendments thereto, and all of said amendments so far as are proper having been embodied in the said proposed bill of exceptions as originally served and filed by amendments thereof;

Therefore, on motion of Kerr & McCord, attorneys for the above-named defendant, it is ordered that the said proposed bill of exceptions heretofore filed by the defendant in said cause, as the same now stands amended as aforesaid, be and it is hereby settled as the true bill of exceptions in this cause, and the same as such be now here settled accordingly by the undersigned Judge of this court who presided at the trial of this cause, and that the said bill of exceptions when so certified be filed by the clerk. [44]

Done in open court this 28th day of September, A. D. 1917.

JEREMIAH NETERER,

Judge.

Due service of a copy of the above-entitled order and certificate is hereby acknowledged on this 28th day of September, A. D. 1917.

PILES & HALVERSTADT,

Attorneys for Plaintiff.

[Indorsed]: Order Settling and Certifying Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Sep. 28, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [45]

*In the United States District Court for the Western  
District of Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Proceedings Had June 21, 1917, 10 A. M.**

BE IT REMEMBERED that heretofore and on, to wit, June 21, 1917, at the hour of 10:00 o'clock A. M., the above-entitled cause came regularly on for trial in the above court, and before the Honorable Jeremiah Neterer, Judge of said court, and a jury.

The plaintiff appearing in person and by Messrs. Piles & Halverstadt, her attorneys and counsel.

The defendant appearing by J. N. Ivey, Esq., of Messrs. Kerr & McCord, its attorneys and counsel.

And thereupon the following proceedings were had and done, to wit: [50]

Thursday Morning Session, June 21, 1917.

Jury empaneled and sworn to try the case.

**Testimony of Mrs. Gertrude Harmon, in Her Own  
Behalf.**

MRS. GERTRUDE HARMON, the plaintiff, produced as a witness on her own behalf, being first duly sworn, testified as follows:

(Testimony of Mrs. Gertrude Harmon.)

Direct Examination.

(By Mr. HALVERSTADT.)

Q. Your name is Gertrude Harmon?

A. Yes, sir.

Q. You are the plaintiff in this case?

A. Yes, I am.

Q. During the years 1913-14, and up to about the 1st of March, 1915, were you connected with any business?

A. I was in the McKenna-Harmon Company and the Harmon Motor Car Company, which was the same company.

Q. What was the McKenna-Harmon Company?

A. Automobile agency.

Q. And what was the Harmon Motor Car Company engaged in? A. Automobile agency.

Q. What connection did you have with either of them?

A. I was secretary and treasurer of both companies.

Q. Did you devote your time to the business?

A. I devoted all of my time, yes.

Q. In what capacity, merely administrative or executive as well? [51]

A. Well, I took care of the office. Was administrative and executive. I took care of the office and watched the men and did all that end of the work.

Q. Will you speak louder, please?

A. I kept the books, and took care of the office, and watched the men's time, did all that end of the work.



(Testimony of Mrs. Gertrude Harmon.)

Q. Were you fully familiar with the business?

A. Yes, I was.

Q. Now, during what years were you connected with the business in the capacity which you have just mentioned?     A. All the time it was in business.

Q. Will you state to the jury just what those years were, when it began and when it terminated?

A. Started in 1912 and up until February,—

Q. What month, 1912?

A. About October, I think it was.

Q. Yes.

A. And up until February, 1915.

Q. Up until February, 1915. Had any sum of money been put in that agency for the purpose of building it up?     Answer yes or no first.

A. Yes.

Q. There had. What sum of money, if any, had you contributed to that money for the purpose of establishing that business?

Mr. IVEY.—Object to that, your Honor please, for the reason this defendant knew nothing about what this plaintiff had put in that business, and didn't superintend it, so far as I understand, so it would be immaterial as to how much money this plaintiff had put into that business, I think.

Mr. HALVERSTADT.—I will withdraw that question. Probably [52] that might be objectionable. I will put it this way:

Q. Mrs. Harmon, what amount of money had you put in the McKenna-Harmon Company, or Harmon Motor Car Company, which had been used by it in



(Testimony of Mrs. Gertrude Harmon.)

order to build up an automobile business?

Mr. IVEY.—Your Honor please, I object to that. I don't know what relation exists between these two companies. Did you bring that out, Mr. Halverstadt?

Mr. HALVERSTADT.—I will in just a minute. I will withdraw that question and take this one up:

Q. Mr. Harmon, I believe you said the McKenna-Harmon Company was a corporation?

A. I don't know whether it was or not.

Q. The McKenna-Harmon Company?

A. Yes, the McKenna-Harmon Company was a corporation.

Q. Now, then, do you know what the legal status of the Harmon Motor Company was?

A. No, I don't.

Q. Now, just state to the Court and to the jury why that answer is made; in other words, why the change of name was adopted and what had been done along that line.

A. The McKenna-Harmon Company, Mr. McKenna was with us, and when he left the company we changed the name of the company to the Harmon Motor Car Company, and put the papers in the hands of an attorney to have it incorporated under the change of name, but the papers were never filed, and I didn't know about that until February that it wasn't an incorporation.

Q. February, what year?     A. 1915. [53]

Q. Now, see if I understand you. You say as McKenna-Harmon Company you were doing busi-

(Testimony of Mrs. Gertrude Harmon.)

ness as a corporation by the name of McKenna-Harmon Company?     A. Yes.

Q. And then you had the proper proceedings taken for the change of name to Harmon Motor Car Company?     A. Yes.

Q. And the papers were left with an attorney, but were never filed in the office of the Secretary of State?

A. No, the attorney didn't file the papers.

Q. He didn't file the papers. And it is for the reason you say you don't know what the Harmon Motor Car Company was?     A. No.

Q. Whether it was a corporation or partnership?

A. Yes.

Q. Now, did you still continue business under the name of the Harmon Motor Car Company as it had theretofore been conducted by the McKenna-Harmon Company, a corporation?     A. Yes.

Q. Just simply went along?     A. Yes.

Q. Now, I will come back to the question again. What sum of money had been contributed by you to the McKenna-Harmon Company or to the Harmon Motor Car Company for the purpose of building up and establishing a business or agency, used in that endeavor?

Mr. IVEY.—I object to that, if your Honor please, for the same reason. I don't know counsel's object in wanting to introduce that testimony; but if plaintiff has any rights in this action it is by reason not of her having put some [54] money into this business, but by reason of this assignment to her. I call

(Testimony of Mrs. Gertrude Harmon.)

your Honor's attention to the fact that the plaintiff is claiming that the Harmon Motor Car Company had a contract with the defendant, that the defendant breached that contract with the Harmon Motor Car Company, and then that the Harmon Motor Car Company assigned to this plaintiff its rights against the Northwest Motor Company after that; therefore it is wholly immaterial as to whether or not this plaintiff put any money into a company that preceded this one, and it will be prejudicial to us. We knew nothing about that, and it isn't claimed we knew about it. Her rights are predicated, if I understand the pleadings correctly, upon the fact she is an assignee of the Harmon Motor Car Company, and not upon the fact she put some money in this company that failed.

The COURT.—I am inclined to think that the objection at this time is good and should be sustained. It may be that the development of this testimony will show that it should be received.

By Mr. HALVERSTADT.—(Q.) Mrs. Harmon, during the years that you were connected with this company, and I understand you were connected with all of them from their commencement? A. Yes.

Q. During these years what had been done in the way of building up a business for the companies?

A. Why, we had built up a good business.

Q. State what had been done in the way of building that up, what acts had been done by you, or by anyone in charge, tending toward building up an established business. [55]

(Testimony of Mrs. Gertrude Harmon.)

A. We always kept advertising in the paper; we spent a lot of money on advertising. When we sold cars we always tried to make a friend out of the customer; that is, we gave him service, and tried to build up a reputation for ourselves for being a good agency in that respect, and I think we had established ourselves in the people's minds.

Q. Now, at the time this contract was entered into, the one of October 17, 1914, had the Harmon Motor Car Company, or whatever name you were conducting business under, established a place of business in the city of Seattle?

A. Yes, we had a place of business.

Q. Where was it?

A. Corner of Boylston and Pike.

Q. Corner of Boylston Avenue and Pike Street?

A. Yes, sir.

Q. Now, just state to the jury where that is in connection with the automobile retail center of this city. Is it near it or—

A. It is right in the center of the automobile district. I think it is the best corner in town.

Q. On which street did your business face, your building face?

A. Our building faced onto Pike street and sided onto Boylston.

Q. It was on that corner, was it?

A. Yes, sir, on that corner.

Q. Now, was Pike street at that time one of the principal thoroughfares of the city of Seattle?

A. Before Pine street was opened up Pike street



(Testimony of Mrs. Gertrude Harmon.)

was used almost exclusively then.

Q. Then since Pine street has been opened up has Pike street been a much used thoroughfare by automobiles? [56]

A. Pike street is, yes, but I think Pine street is coming into its own now.

Q. Was or was not that place of business an advantageous one for the business in which you were engaged?

Mr. IVEY.—I object to that, your Honor please, as calling for a conclusion.

The COURT.—She may answer.

Mr. HALVERSTADT.—Answer the question.

A. At the time we were in business our corner was considered one of the best, if not the best corner in town for an automobile agency.

Q. Was or was not it conveniently located for the automobile business? A. It was, yes.

Mr. HALVERSTADT.—I offer in evidence Plaintiff's Exhibit "1," which I can state very briefly, so the Court will understand, is an assignment of Frank E. Harmon to the plaintiff of all his rights in this matter whatsoever, and of all his interest in the McKenna-Harmon Company or the Harmon Motor Car Company.

Mr. IVEY.—I haven't had time, if your Honor please, to examine these two instruments.

Mr. HALVERSTADT.—Then I am perfectly willing the Court pass on it a little later. Then I offer in evidence Plaintiff's Exhibit "2," which is an assignment of all these concerns to the plaintiff of



(Testimony of Mrs. Gertrude Harmon.)

any cause of action that they, or any of them, had under this contract which is set up in the pleadings.

Mr. IVEY.—What I am trying to find out, if your Honor please, by the examination of these instruments is whether the [57] plaintiff is now claiming that the Harmon Motor Car Company was a corporation or was a copartnership. It must be kind of a cross here between the two. I would like to know.

Mr. HALVERSTADT.—I will state this, your Honor: We have been able to find only two cases where such a question ever arose, and it so happens that both of them are in this state, and I don't think that any court, or I don't think that anyone at the present time can tell just exactly what the law is in that regard; that is, under the facts which are detailed here, that is, where all the steps are taken for the change of name except the actual filing of the papers. But it seems to be the law that it is immaterial whether they are filed or not so far as concerns the doctrine of being a *de facto* corporation, a *de facto* change. Now, I state frankly I don't know what the rule is, but I can't see how it would make any possible difference to these people at all. These assignments will show an assignment by everybody who had any conceivable right to this cause of action to the plaintiff in whatever capacity they may have acted, or whatever may have been their capacity.

Mr. IVEY.—Well, I anticipate your Honor will permit these two documents to be filed, and, as far as

(Testimony of Mrs. Gertrude Harmon.)

I am concerned, they may be filed for whatever they may be worth.

The COURT.—Admitted.

Mr. IVEY.—Reserving, of course, our objection to them on the ground of their immateriality.

The COURT.—Very well.

Assignments referred to received in evidence, marked Plaintiff's Exhibits "1" and "2" and made a part of the record herein. [58]

Mr. HALVERSTADT.—Now, if your Honor please, I offer in evidence Plaintiff's Exhibit "3," which is the contract between the Harmon Motor Car Company and the Northwest Auto Company, the original contract.

Mr. IVEY.—That is admitted.

Mr. HALVERSTADT.—That is the one attached to the pleadings.

Mr. IVEY.—Yes.

The COURT.—Admitted.

Contract referred to received in evidence, marked Plaintiff's Exhibit "3" and made a part of the record herein.

Mr. HALVERSTADT.—Probably in order to enable the jury to follow this better I better read a few of the clauses in this contract.

(Contract read to the jury.)

Q. Now, Mrs. Harmon, this contract, which is introduced as Plaintiff's Exhibit "3," by whom was that form prepared by the Harmon Motor Car Company or by the Northwest Auto Company, or Mr. Vogler?

(Testimony of Mrs. Gertrude Harmon.)

A. That is a Northwest Auto Company form.

Q. I didn't get the answer?

A. You mean who that contract was printed by and prepared?

Q. Yes, who prepared that? Did the Northwest Auto Company or Harmon Motor Car Company?

A. Northwest Auto Company.

Q. In other words, Mr. Vogler brought it up here?

A. Mr. Harmon was in Portland at the time.

Q. Mr. Harmon went down there? A. Yes.

Q. Now, during the first year that any of these concerns were in business what cars did they sell, what make of cars? [59]

A. We sold the Interstate the first year we were in business.

Q. What was the price at which that car retailed?

A. I think the Interstate sold for twenty-four hundred and fifty the first year.

Q. Now, during the second automobile year that these concerns were in business what cars did they sell?

A. The second year we took on the Reo and the Lozier from Mr. Vogler, and we had the Grant and the Interstate besides.

Q. Now, do you recall how many Reo cars were sold by you people in the second year?

A. The second year we were in business and the first year we had the Reo we sold fifty-six Reos.

Q. And how many other cars did you sell?

Mr. IVEY.—If your Honor please, I think I will have to object to the further examination along these

(Testimony of Mrs. Gertrude Harmon.)

lines. I don't see the materiality of that upon this case.

The COURT.—Oh, I think she may answer. It shows an established business, that is all.

Mr. IVEY.—Exception, your Honor.

By Mr. HALVERSTADT.—(Q.) Do you remember the specific number of other cars that the agency sold?

A. Well, counting four Reo trucks we sold, we sold a hundred and three new cars, hundred and thirty-three new cars.

Q. A hundred and thirty-three during the second year?

A. During the second year we were in business.

Q. You say counting four Reo trucks?

A. Counting four Reo trucks, yes, commercial cars.

Q. Now, what kind of a shop, repair-shop, or service department, did you maintain during the second and the third years? [60]

A. We had a large shop and service department.

Q. How long had the company been established at this place on Pike and Boylston that you mentioned a little while ago, prior to the 22d day of February, 1915?

A. I think about a year and a half or two years.

Q. About how long?

A. I think it would be about a year and a half or two years, but I couldn't be positive.

Q. In other words, were you or were you not established at that place of business permanently?

A. Yes, we were.



(Testimony of Mrs. Gertrude Harmon.)

Q. Now, what kind of a service department and repair department did you have there so far as efficiency is concerned?

A. We had a very good service department and repair department.

Q. Very good service department. Now, does or does not a service department benefit an automobile agency?

A. It is one of the biggest factors in selling cars.

Mr. IVEY.—I think counsel is calling for a lot of conclusions, broad conclusions, to say a service department benefits a garage.

The COURT.—Yes, I think that is a conclusion perhaps.

Mr. HALVERSTADT.—Well, I will get at it this way, then:

Q. Mrs. Harmon, mention the factors which enter into making a successful retail automobile agency.

A. Having the right car,—

Q. Having the right car?

A. And giving the proper service on them so you will make friends out of the people you have already sold so they will bring you more customers. [61]

Q. Now, just state to the jury just exactly what you mean by service.

A. I mean when a man buys an automobile he expects to be able to go to a place and get repair parts, and expects, if something happens to his car, he expects to put it in the garage and have the work done for him properly and as quickly as possible.

Q. Now, go ahead. What other elements? You



(Testimony of Mrs. Gertrude Harmon.)

say having the right car and service. What else?

A. And I think good, live salesmen are another factor.

Q. Now, what practice, if any, was followed by the company in rendering speedy service to anyone wanting it?

A. If anyone put in their car for repairs, why, if we had to keep the men and put on a night shift we did it to get their car out for them if they wanted it.

Mr. IVEY.—Mr. Halverstadt, this is all about that McKenna Company, is it not?

Mr. HALVERSTADT.—It is about before the Harmon Motor Car Company was—it will be a question for the Court to pass on, whether it is a partnership or corporation.

Mr. IVEY.—Yes, but the time you are examining the plaintiff on now is the latter part of 1914?

Mr. HALVERSTADT.—I am asking her about the operation of the company, and what it had done, for the purpose of showing what business it had built up.

Mr. IVEY.—That is, the predecessor's interest of this company?

Mr. HALVERSTADT.—Any of them, and what they were doing, particularly at the time this contract was attempted to be cancelled.

Mr. IVEY.—That is what I thought, your Honor, the counsel [62] was asking the witness about what kind of service they gave some two or three years, or some time prior to the time this contract was entered into. I don't believe that is material.

(Testimony of Mrs. Gertrude Harmon.)

I believe your Honor had a tendency to rule against me on that matter—

The COURT.—I think it should be more about the time of entering into the contract.

Mr. HALVERSTADT.—May I do this, your Honor? May I show what had been the practice from the beginning?

The COURT.—Oh, I hardly think so.

Mr. HALVERSTADT.—That is, that might tend to show here was an established business built up which was catering to and received public approval.

The COURT.—I think you should begin at the point at issue, and then you might go back.

Mr. HALVERSTADT.—Very well.

Q. Then, Mrs. Harmon, at the time of the attempted cancellation of this contract on the 22d day of February, 1915, at that time and during the entire time of the life of this particular contract, what had been the policy of the company in regard to these matters which you are speaking of as making an agency successful?

Mr. IVEY.—Now, your Honor, I doubt very seriously if this witness would be permitted to testify to the policy of her company. Of course she would say the policy of her company was to treat her customers fair.

Mr. HALVERSTADT.—Then I will change the question:

Q. What had your company done during those times in the particulars mentioned? Now, have you any objection to that? [63]

(Testimony of Mrs. Gertrude Harmon.)

Mr. IVEY.—That is a pretty broad question.

The COURT.—Let her answer it.

Mr. HALVERSTADT.—Now, answer the question.

A. We had taken care of anybody we had ever sold a car to.

Q. That is a little general. Just state what you did in the way of rendering service, or any of those things which you mentioned, the speed with which it was gotten out, or anything along that line.

Mr. IVEY.—I think, your Honor please, that is pretty self-serving. I think the witness is called upon to tell this jury “we had a fine concern down there.” Of course she would say that.

Mr. HALVERSTADT.—I am asking what they did, not her opinion of it.

Mr. IVEY.—It would be kind of like asking Mr. Halverstadt what kind of a lawyer he was. He would say he was a good one if he would say anything.

The COURT.—Let’s find out something about the facilities, and then what was actually done, then let the jury determine.

Mr. HALVERSTADT.—All right.

Q. Now, Mrs. Harmon, will you please state to the jury what facilities the company maintained during that time for serving the public, for serving the automobile owning public?

A. We had a well equipped machine shop; we had a very competent repair man.

Q. What else did you have there?

A. In the way of taking care of cars afterwards?

(Testimony of Mrs. Gertrude Harmon.)

Q. In the way of taking care of the automobile owning public? [64]

A. Well, we had a garage and shop. We had—the repair department was upstairs. We kept sometimes eighteen or nineteen men, sometimes not so many. Depend on how much work we had. We always had good men.

Q. What was the character of the work which was turning out of that repair-shop?

A. It was always good. I guess we didn't have any complaint.

Mr. IVEY.—I move to strike that out. I think that is going a little bit too far again.

The COURT.—Oh, it may stand. It is not prejudicial, I think. It is a conclusion of course.

Mr. HALVERSTADT.—Then I will put it this way:

Q. Did you have complaint of the character of work which was done in that repair-shop?

A. You can't be in business without having complaints from some one. I suppose we had a few complaints. But, as a general rule, we had very satisfied people; they always came back to us again.

Q. Now then, was work turned out rapidly there or was it turned out slowly?

A. Turned out as quickly as it could be and be good work.

Q. Was that kind of work continued only in the day-time?

A. If we had work in that ought to be out, the man said he wanted his car, why, we worked the men in



(Testimony of Mrs. Gertrude Harmon.)

the night, or put on another force.

Q. Then whether a man's work was done in the day-time or night depended on his own option, did it?

Mr. IVEY.—I certainly think this is objectionable. I believe if counsel wants to show what the earning capacity of this concern was by producing his books, and show how much they [65] made and how much they paid out, I think that would be material; but I don't believe these little details, detailing ways of handling little things around the shop, has anything to do with the defendant or this defendant has anything to do with that.

The COURT.—You think it has any bearing, Mr. Halverstadt, these details are matters of any concern?

Mr. HALVERSTADT.—Yes, for this reason, your Honor: There will be a claim here for profits, what are known as prospective profits. Under all the authorities we can't simply testify what in our opinion we would have made, but we have to show all the details of the business, show the establishment of the business, what had been done, as furnishing a basis for which the jury or the court may determine whether they are or are not too speculative, and for that reason they are perfectly material.

Mr. IVEY.—Well, I think, if your Honor please, if counsel wants to show what the earnings of the company were prior to this date, that probably would be material.

Mr. HALVERSTADT.—That is only one element that enters into the matter.



(Testimony of Mrs. Gertrude Harmon.)

The COURT.—Read the last question. (Question repeated.) I think the objection should be sustained to that.

Mr. HALVERSTADT.—Exception.

The COURT.—When we have the facilities, and the manner in which we dispatched the business, likewise the way it was received by the public, I think that is about as far as we should go.

By Mr. HALVERSTADT.—(Q.) During the time this contract in [66] suit was in force did you maintain any salesmen?

A. Yes, we had a salesroom.

Q. Whom did you have as permanent salesmen?

A. Had Mr. Minor and Mr. Thornton.

Q. Were they or were they not experienced automobile salesmen? A. Yes, they were.

Q. Were either of them familiar with the business generally of the company?

A. Mr. Minor only handled the sales end of it. Mr. Thornton was familiar with the other end of the business.

Q. He was familiar with all of the business?

A. Yes, I think he was.

Q. Now, Mrs. Harmon, what are the months which are considered, or which in fact are, the months in which automobiles can be sold? What is the automobile season each year what months?

A. It starts about the middle of February and goes on until about the last of June.

Q. Middle of February to the last of June of each year. Are or are not those the months in which the

(Testimony of Mrs. Gertrude Harmon.)

retail sales are principally conducted?

A. They are the months, yes. There is very little—

Q. Now then, prior to that what is necessary to be done by an agency in order to effect sales of an automobile?

A. Well, you have got to advertise, advertise during the winter whether you sell cars or not, and keep your car before the people, and keep up your sales-room in good shape, and your garage in good shape, and get ready for the spring business.

Q. Get ready for the spring business. Now then, at the time, [67] say up to the 1st of February, 1914, had you established any subagencies?

A. February, 1915?

Q. '15, yes.

A. Yes, we had a Mr. Burke at Everett,—

Q. Just simply state the places. In what places had you agencies established?

A. Everett, Snohomish, Skagit, Whatcom,—

Q. I want the towns in which the agencies were established.

A. I thought you wanted the counties that the agencies were contracted for?

Q. Well, go ahead with the counties.

A. Snohomish, Skagit, Whatcom and Clallam. We had an agency, of course, at Kent, but that only covered Kent. That wouldn't take in King County. In King County we wouldn't give an agency.

Mr. HALVERSTADT.—I offer in evidence Plaintiff's Exhibits "4," "5" and "6."

(Testimony of Mrs. Gertrude Harmon.)

Mr. IVEY.—Did the defendant have notice, Mr. Halverstadt, of these contracts being executed?

Mr. HALVERSTADT.—Yes, sir. I have a letter acknowledging receipt of a copy of each of these if you wish to see it.

Mr. IVEY.—I have no objection to them except their immateriality, your Honor, please.

Subagency contracts referred to received in evidence, marked Plaintiff's Exhibits "4," "5" and "6" and made a part of the record herein.

By Mr. HALVERSTADT.—(Q.) Handing you, Mrs. Harmon, instruments which are marked Plaintiff's Exhibits "4," "5" and "6," I will ask you to examine them and see whether those are contracts which you referred to? Are they? [68]

A. Yes, sir.

Q. Now, I notice in one of them—

Mr. IVEY.—Let me see one of them.

By Mr. HALVERSTADT.—(Q.) —the contract which covered Skagit County, Knutzen Bros., that they agree here to buy twelve cars. Did Knutzen Bros. later increase the number of cars which they purchased?

A. Knutzen Bros. then took on, right towards the last,—

Mr. IVEY.—Object to that as immaterial, your Honor please, unless that matter, too, was called to the defendant's attention. I don't know whether Mr. Halverstadt proposes to prove that or not.

Mr. HALVERSTADT.—I don't know whether that was or not.

(Testimony of Mrs. Gertrude Harmon.)

The COURT.—She may answer.

A. Knutzen Bros. afterwards took on Whatcom County, and there was a verbal agreement, there hadn't been a written contract given yet, but a verbal agreement they were to get eight more cars for Whatcom County.

By Mr. HALVERSTADT.—(Q.) Now then, to the twelve they were to get eight more cars for Whatcom County in addition, so that made twenty cars that Knutzen Bros. were purchasing?

A. Yes.

Q. Twenty all told. And Fred C. Poole, of Clallam County, agreed to purchase three?

A. He contracted for three.

Q. And Burke Motor Company, in Snohomish County, agreed to purchase twenty? A. Yes.

Q. Now, had any steps been taken in the way of attempting to establish any other agencies than those you have [69] mentioned which might not have been completed on the 22d day of February, 1915?

A. Mr. Thornton had been to Ellensburg to close up Kittitas County, and had it practically closed at the time the contract was cancelled; in fact, it was closed about a week after that, or very shortly after that, by the new agency.

Q. And how many cars did that involve?

A. They contracted for four cars.

Q. Now, how many cars did the Kent Motor Car Company that you mentioned agree to purchase?

A. Three.



(Testimony of Mrs. Gertrude Harmon.)

Q. Now, in addition to these cars which you have mentioned as going to subagents can you tell me how many other cars you had sold up to the 22d day of February, 1915?

A. We had made deals on or had promise?

Q. No, that had been sold, whether delivered or not. In other words, what was the total number of cars that had been definitely disposed of on the 22d day of February, 1915?

A. We had sold one to a Mr. Cline,—

Q. No, just give me the number.

A. I can't without figuring it over.

Q. You have forgotten the figures? All right, I will prove that otherwise by another witness. Now, what number of cars had the defendant delivered to you up to the 22d day of February, 1915?

A. Nine.

Q. Do you remember approximately the dates of those deliveries and the numbers of each consignment? [70]

A. We had one single car come to us on the 19th of October, a 1914 model was delivered to us on our new contract. We had a carload on the new contract, four Reos, come in about the 20th of January, and another car—

Q. What year?

A. 1915. And another car of Reos, four Reos, came in on—I think it was the 19th of February.

Q. 1915?

A. Two or three days before they cancelled.

Q. You speak of a carload. How many constitute

(Testimony of Mrs. Gertrude Harmon.)

a carload?     A. Four.

Q. Now, what was the factory price of those cars, do you recall, the Reo cars, that year?

A. It was ten seventy-five, I think.

Q. Ten seventy-five for the Four. What was the Six?     A. Twelve ninety-five, I think.

Q. Well, I will prove those later. Let me see if you have that correct. Let me refresh your recollection. Wasn't the factory price of the Four, that is, the Four-cylinder car, ten fifty?

A. Yes, that was—

Q. And the Six-cylinder car fifteen hundred and twenty-five?

A. Yes, the Four was ten-fifty and sold—

Q. Do you recall what the Six model sold for?

A. Something over fifteen hundred dollars.

Q. Wasn't it fifteen hundred and twenty-five?

A. I couldn't say.

Q. Don't remember the figures. Now, up to the 22d of February, then, you had received just nine cars?     A. Yes. [71]

Q. Now, what effort had been made to get more cars from the defendant?

A. Every effort we could. We telephoned and wrote, and telephoned some more.

Q. Were you having any trouble with your sub-agents because of the fact you could not get deliveries?

A. Yes, I was having trouble with both my sub-agents, and my salesmen, too, were complaining about it.

(Testimony of Mrs. Gertrude Harmon.)

Q. Now, where it is impossible to get deliveries of cars is it or is it not possible to sell cars rapidly or easily?

A. No, if you can't promise a man a delivery on a car it is almost impossible to get him to give you his money for the car.

Q. Well, aside from getting his money is it easy or hard to get him to sign a contract for one to be paid for when the car comes?

A. No, I don't think you could get him to sign a contract either if you couldn't tell him when you could give it to him.

Q. In other words, when he wants to buy the car he wants the car?

A. He generally does, yes.

Q. Now, was the defendant advised of the fact that you were having trouble with your subagents because of the fact you couldn't make deliveries to them?

A. I believe he was advised by letter, yes.

Q. When a shipment of automobiles come in how is the bill of lading sent, what do you have to do with the bill of lading, and so on, to get the shipment?

A. There is a draft attached to the bill of lading.

[72]

Q. For what amount?

A. For the amount of the cars themselves.

Q. The draft and bill of lading come to some bank?

A. Yes, it is sent to the bank.

Q. Now, is that the way these cars had theretofore been shipped to you?

(Testimony of Mrs. Gertrude Harmon.)

A. Yes, they were always shipped that way.

Q. And the way these nine you mentioned were shipped to you? A. Yes.

Q. Now, what arrangements had you made for meeting those drafts in the event you needed any money as they might come in?

A. If we needed, didn't have—

Q. Just state what arrangements you had.

A. The Northern Bank & Trust Company took up the bill of lading, and as soon as—we gave them our note for it, and as soon as the cars were sold we paid off the note.

Q. Was that practice one which had been followed prior to this year?

A. Yes, we had that arrangement the year before with them, too.

Q. And had been followed out during the entire year before? A. Yes.

Q. Now, when this shipment of four came in in the latter part of January, 1915, how was that shipment taken care of? A. In the same way.

Q. Was there any delay?

A. It was taken up the same day the cars got in.

Q. They shipped on the 19th of February, 1915. How was that taken care of?

A. The same way. [73]

Q. Was there any delay in taking up that draft?

A. No, there was no delay.

Q. And you say you had an arrangement with the Northern Bank & Trust Company to do the same



(Testimony of Mrs. Gertrude Harmon.)

thing for you whenever you needed it throughout this entire season?

A. Yes, the arrangements had been made.

Q. Now, had you personally made such arrangements?     A. Yes, I had.

Q. Had you personally ascertained that you could continue that arrangement yourself?

A. Yes, I had.

Q. That is, after the entire business was turned over to you?

A. Yes, I had been to the bank since then.

Q. Now, when these cars came in what did you do with the first one, the one that come in in October, 1915?

A. We sold that to our agent in Everett.

Q. Now, when the second shipment, when the first shipment of four came in the latter part of January, 1915, what did you have to do with those cars?

A. Well, we gave one of them to the agent at Everett, and one to the agent at Burlington—that is Skagit County—the other two I think we sold in Seattle.

Q. Now, then, the second shipment of four, coming in about the 19th of February, 1914, what did you have to do with those?

A. Two of those went to agents and the other two were sold at retail.

Q. Now, then, during—

Mr. IVEY.—I didn't get that.

A. Two of those went to agents and the other two were sold [74] at retail.

(Testimony of Mrs. Gertrude Harmon.)

By Mr. HALVERSTADT.—(Q.) Now, then, during this period, say up to the 19th of February, had your agents, had or had not your agents and salesmen been demanding cars?

A. They had, yes.

Q. And were you able to furnish them to them?

A. No, I wasn't, because I didn't have them.

Q. Why?

A. I hadn't gotten deliveries of them from the Northwest Auto Company.

Q. Now, then, so far as establishing any more subagents in the territory, in view of the fact that you couldn't tell when you could get deliveries could you or could you not have established more subagencies?

A. Well, I think a desirable subagent would probably be—

Mr. IVEY.—I think, your Honor please, that is rather speculative, as to what they could have done.

The COURT.—I think it should be sustained.

Mr. HALVERSTADT.—I beg your pardon?

The COURT.—I think that is rather too speculative.

Mr. HALVERSTADT.—I will put it this way:

Q. If you cannot promise delivery of cars on certain specified dates or months, is or is not it difficult to establish desirable subagencies?

Mr. IVEY.—I think, your Honor, please, it goes without saying if a party couldn't make deliveries they would have difficulty in getting anything going. I don't believe that question—

The COURT.—Sustained. [75]

(Testimony of Mrs. Gertrude Harmon.)

By Mr. HALVERSTADT.—(Q.) Now, up to the 22d of February, 1915, when this contract was attempted to be cancelled, what difficulty, if any, did you have? What was the difficulty, if any, that you had in the way of running the agency?

A. To have something to sell, to have more cars to sell.

Q. In other words,—

A. To get the cars.

Q. To be able to sell something? A. Yes.

Q. Now, Mrs. Harmon, I notice there is attached to this contract, which is marked Plaintiff's Exhibit "3," this memorandum which I read to the jury concerning the payment of this note. Was that note paid? A. Yes, it was paid.

Mr. IVEY.—I think I stated in my statement to the jury that note was paid some time along in March.

Mr. HALVERSTADT.—That isn't the fact. It was paid in partial payments. And I will introduce the whole correspondence file here.

Q. Look through this file of correspondence which I hand you, marked Plaintiff's Exhibit "7," and see if those are letters which are written by the Northwest Auto Company?

Mr. IVEY.—You might have the witness call off the dates of those so I can check off my files. Those are letters from the Northwest Auto Company to the Harmon people, are they?

Mr. HALVERSTADT.—They are letters from the Northwest Auto Company, dated November 4, 1914,

(Testimony of Mrs. Gertrude Harmon.)

November 17, 1914, November 18, 1914, November 23, 1914, November 30, 1914, December 7, 1914, December 9, 1914, January 4, 1915, [76] January 7, 1915, February 24, 1915. And I offer the exhibit in evidence.

Mr. IVEY.—Your Honor, please, we have no objection to it, save to my inspection of it to see if they are all right, and I have no doubt they are.

The COURT.—Admitted.

Mr. HALVERSTADT.—All right, glance through them, if you will.

Mr. IVEY.—We seem to have all except the one of February 24th, but I think that is all right.

Mr. HALVERSTADT.—I offer these letters in evidence.

The COURT.—Admitted.

Mr. HALVERSTADT.—I will read them to the jury. We are withholding for the present the letter of February 24th.

(Reading letters to the jury.)

Letters referred to received in evidence, marked Plaintiff's Exhibit "7" and made a part of the record herein.

Q. Now, Mrs. Harmon, from these letters it appears. that on January 4, 1915, there was \$1,194.04 due on that note. Now, what payments, if any, were made on it thereafter?

A. Mr. Vogler accepted a Winton automobile.

Q. About when was this?

A. That was around the first part of February; about the 4th, I should imagine.



(Testimony of Mrs. Gertrude Harmon.)

Q. Of what year?      A. Of 1915.

Q. And where did this take place?

A. In Seattle, up at our agency.

Q. Now, you say he did what?

A. He accepted a Winton automobile we had there as a seven hundred and fifty dollar payment on the note. [77]

Q. Was this Winton car new?

A. No, it was a second-hand one.

Q. Whose suggestion was it that be turned over to him?

A. Mr. Vogler's suggestion. He said he had a place for it.

Q. Said what?

A. Said he didn't have any second-hand cars in Portland and thought he had a place for it.

Q. Now, right at this point let me ask this question: Where was the place of business of the Northwest Auto Company, the defendant?

A. In Portland.

Q. Now, that was an addition payment, then of seven hundred and fifty?      A. Yes.

Q. Now, what funds, if any, belonging to the Harmon Motor Car Company did the Northwest Auto Company have at that time?

A. They had a twelve hundred dollar deposit.

Q. Twelve hundred dollar deposit?      A. Yes.

Q. Although you were required to deposit with them only seven hundred and fifty by the terms of the contract?

A. Yes, they had an excess deposit of \$450.00 that

(Testimony of Mrs. Gertrude Harmon.)

was to take care of the note.

Q. And that excess deposit they had on hand, with the Winton, you say paid the note?

A. Yes, that Winton—when Mr. Vogler accepted the Winton it was understood that cleaned the note up.

Q. Who is Mr. Vogler; what connection has he with the Northwest Auto Company? [78]

A. He is President of the Northwest Auto Company.

Q. Now, were those payments satisfactory to the Northwest Auto Company.

Mr. IVEY.—Object to that as calling for a conclusion, your Honor.

The COURT.—She may answer.

Mr. IVEY.—She can testify to what the facts are.

The COURT.—She may answer.

A. Do you mean the *Winto* car or—

By Mr. HALVERSTADT.—(Q.) Yes, were all of those payments satisfactory?

A. Yes, they told us they were.

Q. And he accepted all of these?

A. Yes.

Q. And made no objection to them that you have heard? A. No, made no objection.

Q. Now, then, about what time do you say it was this Winton was turned over to Mr. Vogler here?

A. It was in the first week of February.

Q. First week of February what year?

A. 1915.

Q. How long was Mr. Vogler in the city of Seattle

(Testimony of Mrs. Gertrude Harmon.)

in the early part of February, 1915, the time you speak of?

A. I imagine it was about a week, but I couldn't tell you exactly.

Q. You can testify to only what you know, Mrs. Harmon. About how long do you know that he was here; that is, from talking to him or seeing him on the street?

A. Well, what I mean is I don't recall the exact number of days he was in town. [79]

Q. Well, give the jury approximately some idea.

A. About a week.

Q. About a week. Now, then, at the time he was here did or did you not lay all the facts concerning you and Mr. Harmon's relations before Mr. Vogler?

A. Yes.

Q. Everything without any reservation?

A. Yes.

Q. What, if anything, did he say to me about cancelling the contract?

A. He didn't say anything to me about cancelling the contract.

Q. Did you ask him whether you might proceed with it as before?

A. I don't think I asked him. I don't believe there was any question came up about the cancellation.

Q. No question came up about it? Did you or did you not advise Mr. Vogler that you had the same arrangement existing at the bank, which you mentioned a moment ago, for the taking up of these drafts and bills of lading?

(Testimony of Mrs. Gertrude Harmon.)

A. He asked me what relation I had at the bank, and how the bank had treated me and was going to treat me, and I told him we had the same arrangement as last year, and the bank had treated me very nice, and was going to continue to do so.

Q. And had that arrangement been made by you at the bank after Mr. Harmon had separated?

A. Yes.

Q. And was the bank advised of the fact you had separated? A. Yes, immediately.

Q. I call your attention to Plaintiff's Exhibit "8" and ask you whose signature that is at the bottom of the letter? [80]

A. That is one—that is Mr. Clark's signature.

Q. Now, what connection has Mr. Clark, if any, with the Northwest Auto Company?

A. I think he is secretary; that is my impression.

Q. That is what?

A. Secretary of the company, I think.

Mr. HALVERSTADT.—We offer in evidence Plaintiff's Exhibit "8."

Mr. IVEY.—I think we admit that, don't we, Mr. Halverstadt, in our pleadings?

Mr. HALVERSTADT.—I am not sure.

The COURT.—Admitted.

Letter of Feb. 22d received in evidence, marked Plaintiff's Exhibit "8," and made a part of the record herein.

By Mr. HALVERSTADT.—(Q.) Did this letter come to you in due course of mail after the date it bears date?



(Testimony of Mrs. Gertrude Harmon.)

A. Yes, it came by registered mail on the 23d of February.

Q. Now, prior to that date had you had any intimation at all that this contract was to be canceled?

A. No, it came as a complete surprise to me.

Q. Speak louder, please.

A. The cancellation came as a complete surprise to me.

Q. And all these payments on the note had been made and accepted by the Northwest Auto Company prior to this date?

A. Prior to the cancellation, yes. The note was entirely taken care of.

Q. Had the interest on the note been kept up theretofore as it was due?

A. The interest was always paid on our "parts" account and was paid with the parts.

Q. And was paid. Calling your attention to an instrument [81] marked Plaintiff's Exhibit "9," I will ask you whose signature that is.

A. Mr. Clark's.

Q. The same man mentioned a moment ago as the secretary? A. Yes.

Mr. HALVERSTADT.—I offer in evidence Plaintiff's Exhibit "9."

Mr. IVEY.—No objection.

The COURT.—Admitted.

Letter of February 22d received in evidence, marked Plaintiff's Exhibit "9," and made a part of the record herein.

(Testimony of Mrs. Gertrude Harmon.)

By Mr. HALVERSTADT.—(Q.) Who was F. C. Poole?

A. He was our agent for Clallam County.

Q. Your subagent, you mean?

A. Well, we were dealers. I guess they were called agents. Yes, they were subagents.

Q. Now, had your other agents been notified?

A. All the agents were notified.

Q. At the same time? A. Yes.

Q. The same time that you were notified?

A. Yes.

Q. After that did the defendant deliver you any more cars? A. After the cancellation?

Q. Yes.

A. I got one more car—not from the defendant. I got it from the new agency, to complete—

Q. Speak a little louder, Mrs. Harmon. Repeat your answer. After the 22d of February did you get any more cars?

A. I got one more car. Not from the defendant, but from the new agency that handled the car in Seattle. I got a [82] car from them to make delivery to a man who had given me his money for a car. That is the only car I got.

Q. What was the name of that new agency?

A. Sharpe & Leader was the men. I think they called themselves the Puget Sound Motor Car Company.

Q. Now, outside of that one additional car could you get delivery of any cars after the 22d of February, 1915? A. No.

(Testimony of Mrs. Gertrude Harmon.)

Q. Were or were not you compelled to return deposits which had been made by others on cars?

A. Yes, we had three other deposits from men we were returning money on because we couldn't make delivery.

Q. Why did you have to return the money to them?

A. We couldn't make delivery of the cars so we had to give them back their money.

Q. Mrs. Harmon, at the time this contract was cancelled could you have secured the agency for another car and prosecuted your business thereafter?

Mr. IVEY.—Object to that, if your Honor please. The witness may answer the question as to whether or not she undertook to do so.

Mr. HALVERSTADT.—This little woman has been engaged in this business for a number of years prior to that, and I want to show by her what situation she was in with reference to getting another agency.

Mr. IVEY.—She can state whether she tried to get another. The question whether she could have—

Mr. HALVERSTADT.—I will withdraw the question.

Q. Was it possible for you, Mrs. Harmon, to get an agency in this territory for another car? [83]

Mr. IVEY.—We object to that, if the Court please, of course. The witness may testify as to whether or not she tried to get one and what the facts were, but what is possible and impossible of course is too broad a question for anybody to try to answer.

(Testimony of Mrs. Gertrude Harmon.)

The COURT.—You *may excused* from the courtroom for a few minutes, gentlemen of the jury.

(Jury retires.)

The COURT.—I don't know that I understand the basis upon which a recovery is predicated, whether it is for loss of profits upon this contract, or injury or damage to business, or recovery of money that was invested because of representations held out by the defendant company. The inquiry, of course, might cover all or any of these so far as the question is concerned, and I thought perhaps we had better find out.

Mr. HALVERSTADT.—The theory is this, your Honor: You will find in consulting the contract, and so on, we have two things coming to us. We have coming to us the amount of money which we had earned by sales up to the time they terminated the contract. Now, the only question there is—the only inquiries are two: How many cars did we sell and how much did we make on each one of them? They have no deduction coming to them whatever because of expense which it cost us to sell those cars; we had paid that and that is none of their business. Further, if we can show the Court or the jury by evidence which the Court believes is not wholly speculative that had the defendant let us go ahead with the sale of these cars and made deliveries to us as he agreed to do, we could [84] during the period from February 22, 1915, to the 31st of July, 1915, the balance of the contract, have disposed of the other cars. Now, we can do that in a number of ways, by showing a number of people we had waiting for cars, the



(Testimony of Mrs. Gertrude Harmon.)

number of machines that were sold, the character of the machine, the improved character of it over any previous year, its standing with other machines, and the excellence of the machine, and everything of that sort. I am not going at this time into the character of evidence that will be introduced, but just illustrating the two character of damages we suffered. First, we are entitled to the money we earned; second, we are entitled to the money we would have earned in carrying out this contract, less the expense we would have incurred in carrying out the contract during the period from the date of its cancellation to the expiration of the contract. Now, that is the theory.

Mr. IVEY.—I assumed, your Honor please, that would be the theory of counsel, but I think the great number of the questions he has been asking were immaterial even upon that theory. Now, for instance, this last question that I objected to I think is improper. He is asking the witness if it was possible for her to get another job.

Mr. HALVERSTADT.—The reason for that is this: You will remember the very familiar rule of law that on breach of contract we must reduce our damages so far as we could. Without any testimony on our part the Court may very well say, "Why, probably you could have gotten another agency."

Mr. IVEY.—I am objecting to that particular question. [85]

Mr. HALVERSTADT.—All right. Now, she didn't make any effort to get an agency for the rea-

(Testimony of Mrs. Gertrude Harmon.)

son she couldn't get one, due to this fact: In the automobile business, the evidence will show, there is a peculiarity in this, that you may have a perfectly good car, as good as any on the market. If that car is not known, why, you can't sell it. In other words, the public are buying automobiles that are known and are standard, and which have been represented here and been built up. In other words, taking on a new agency for a new car which was not known here you would simply be pioneering in the business, and the result would have been that instead of making any money and reducing your damages she would have lost money. Of course, we couldn't recover that from him. That is what I want to introduce this testimony for. There is just one thing else. I want to show further that all of the well-known cars here, all of the cars which are well known in this territory, were represented here, that we couldn't get them. I don't want to be caught in a position where counsel will say, "Why, you should have reduced your damages," and I have got to meet it the only way I can.

Mr. IVEY.—I shall contend, your Honor, they should have made efforts to get another agency. Now, if counsel will attempt to stand by his position he didn't make any effort because he knew he couldn't get any, he would have no evidence along that line. But I still contend if he did take that position it would be improper for your Honor to let that witness testify it would be impossible to get an agency, because we all know none of us can make a statement of that kind truthfully about [86] any-

(Testimony of Mrs. Gertrude Harmon.)

thing of that kind. We don't know what we might get.

The COURT.—Well, I found out just what I wanted to know. We will take a recess until 2:00 o'clock.

Whereupon adjournment was taken until 2:00 o'clock P. M. [87]

Thursday Afternoon Session, June 21, 1917,  
2:00 o'clock P. M.

**Testimony of Mrs. Gertrude Harmon, in Her Own  
Behalf (Resumed).**

Mrs. GERTRUDE HARMON on the stand.

Direct Examination (Resumed).

(Jury recalled.)

(By Mr. HALVERSTADT.)

Q. How many models of Reo cars did the Reo factory make during this season of which we were speaking, that is, this last season you were in business?

A. They made a six-cylinder and four-cylinder model.

Q. That is, two models?

A. Two models, yes.

Q. Now, then, Mrs. Harmon, what kind of a car was the car, so far as desirability, use, efficiency, and things of that sort, were concerned?

A. The Reo was one of the best medium-priced cars on the market.

Q. One of the best medium-priced cars on the market? What other cars, or what cars did you

(Testimony of Mrs. Gertrude Harmon.)

have to sell, did you have most competition with in sale?

A. We had the most competition with the Buick, but we really had a little competition with the Overland and the Studebaker.

Q. Now, then, had you any advantage, from the salesman point of view, in selling the Reo over the Buick?

A. The Buick was about two hundred dollars higher priced [88] than the model we ran in competition with.

Q. In selling cars is the price a material factor?

Mr. IVEY.—Your Honor please, I think that goes without saying it was.

The COURT.—She may answer.

Mr. HALVERSTADT.—Answer the question.

A. Yes, the price is a material factor.

Q. Now,—I don't know whether I asked you this morning or not—about what time was it that medium-priced cars were placed on the market by automobile factories generally?

A. In the year 1915 almost all the automobile factories began placing medium-priced cars on the market and more or less cutting out the higher-priced cars.

Q. Now, what effect, if any, did the reduction in price have on the market in which, that is, the size of the market in which you could sell those cars?

A. It greatly increased the market for automobiles.

Q. Why?



(Testimony of Mrs. Gertrude Harmon.)

A. Because it put the automobile within reach of men. Before they were up against buying either a very cheap or very high-priced car, but when they brought out cars which had good lines, and had electric equipment, electric lights, it made them desirable, and it put them in the reach of people who hadn't thought of automobiles before.

Q. Now, then, was the Reo, were those Reo models the factory manufactured that year, and which you had bought, were they up to date in equipment and so on?

A. Yes, they were in every respect; they were up to the latest models.

Mr. IVEY.—We will admit that the Reo was a pretty good car, [89] Mr. Halverstadt.

By Mr. HALVERSTADT.—(Q.) Now, what year was it that the self-starter and the other comfort-adding devices were introduced in the automobile trade?

A. They started to introduce them in 1913 and '14, but they were more generally placed on all the cars in 1914 and '15; I guess more in 1915.

Q. Was that the year in which they were generally introduced by manufacturers?

A. That is the year they were put on the medium-priced cars. The higher-priced cars started a little before that.

Q. Now, what kind of a car was the Reo, either of these models, in the way of power?

A. It had plenty of power. The Reo was a powerful car, and it stood up well, too.

(Testimony of Mrs. Gertrude Harmon.)

Q. What kind of satisfaction did it give to the purchaser in the way of not getting out of order, things of that sort?

A. The Reo is a very sturdy car and gave good satisfaction to people who bought it.

Q. Mrs. Harmon, I call your attention to a number of letters here, and I will ask you whether those were received by the Harmon Motor Car Company (exhibiting same to witness).

A. Yes, they were.

Q. From whom?

A. From the Northwest Auto Company.

Mr. HALVERSTADT.—I offer those letters in evidence.

Mr. IVEY.—I would like to have Mr. Clark, your Honor please, look them over.

Mr. HALVERSTADT.—As Plaintiff's Exhibit "10." [90]

Mr. IVEY.—I will look them over right now.

By Mr. HALVERSTADT.—(Q.) Now, Mrs. Harmon, speaking now of the model which was sold the previous year, how did the model of the year 1915 compare with the model for the previous year in all these particulars that you have been speaking of?

A. Well, in 1914, the Reo made only a four-cylinder car. In 1915 they came out with a six-cylinder car, and the six, of course, we never got any of those, but their specifications were very good. But the four-cylinder car was more powerful by twenty or twenty-five per cent anyway. It had *better in it*, had a longer wheel base, and was a

(Testimony of Mrs. Gertrude Harmon.)

better car all around than the 1914 car was.

Q. Now, then, speaking of the 1914 cars, did you have any complaint, or what complaint did you have, if any, from purchasers of the 1914 model? What satisfaction did it give?

A. The '14 car gave good satisfaction.

Q. Even that car gave good satisfaction?

A. Yes, gave good satisfaction.

Q. What, *Mr.* Harmon, was the effect on the market for automobiles when the self-starter was put on?

A. The self-starter and the electric lights made it possible for women to drive cars who wouldn't consider cranking a car before or bothering with a presto tank, and it made the automobile a family proposition, where, before, if the man was away at his business all day long and took the car with him his wife wasn't much interested in the car, it was only a Sunday proposition, but after the women started to drive it greatly increased the sale of [91] automobiles.

Q. Did it increase the market of automobiles?

A. It increased the market of automobiles a great deal.

Q. Now, Mrs. Harmon, when this letter of February 22, 1915, came to you, the letter by which they attempted to cancel your contract, did you make any effort to secure another agency?

A. No, I did not.

Q. Why did you not?

A. There was no agency at that time that would have been desirable and would have been a money-maker agency open.

(Testimony of Mrs. Gertrude Harmon.)

Mr. IVEY.—Move to strike that answer, your Honor please, upon the ground it is stating a conclusion. The witness admits she made no attempt to get another agency, and states as a conclusion that there weren't any. If she made no attempt to get one she couldn't possibly know there weren't any. I move to strike that out.

The COURT.—The motion is denied.

By Mr. HALVERSTADT.—(Q.) Suppose this, Mrs. Harmon, suppose at the time you received that letter and the defendant refused to deliver you any Reo automobiles, there had been manufactured a car equally as good in all respects as the Reo, a car of similar price and equally desirable, but which was not known in the territory, the agency included in your contract, could or could not that model have been taken by you at that time with profit?

A. Not the first—

Mr. IVEY.—It is calling for a conclusion, your Honor please.

The COURT.—Overruled.

Mr. HALVERSTADT.—Answer the question.

[92]

A. There couldn't have been a car then that I could have taken and made money out of the first year I had it if it wasn't well-known car.

Q. Why?

A. I don't care how good an automobile is, if the people don't know it in the section of the country you are selling it in you can't sell that car, if it isn't well known and well advertised in that section.



(Testimony of Mrs. Gertrude Harmon.)

Q. Mrs. Harmon, supposing at the time this letter of February 22d came to you you had attempted to run your plant up there merely as a repair-shop, would that have been possible with profit?

A. The location we had wasn't built for a garage, it was built under our directions for an automobile salesroom, and the main part of the building was given up to our salesroom; it wasn't laid out for a garage and couldn't have been run profitably for a garage.

Q. Mrs. Harmon, I call your attention to an instrument marked Plaintiff's Exhibit "11," and ask you whether this came to the possession of the Harmon Motor Car Company.     A. Yes.

Q. From whom?

A. From the Northwest Auto Company.

Mr. HALVERSTADT.—I offer the instrument in evidence as Plaintiff's Exhibit "11."

Mr. IVEY.—No objection to that exhibit.

The COURT.—Admitted.

Letter of Feb. 15, 1915, received in evidence, marked Plaintiff's Exhibit "11," and made a part of the record herein. [93]

By Mr. HALVERSTADT.—(Q.) Mrs. Harmon, who is Mr. Thornton, mentioned in this letter, "Attention of J. M. Thornton"?

A. He was head salesman, sales manager for me.

Mr. IVEY.—The only objection I have to this Exhibit No. 10 is that it appears to be a lot of circular letters, a good number of which were written

(Testimony of Mrs. Gertrude Harmon.)

prior to the date of this contract. Isn't that correct, Mr. Halverstadt?

Mr. HALVERSTADT.—Only one of them, I think.

Mr. IVEY.—August the 7th?

Mr. HALVERSTADT.—Yes. The contract is dated October 17th.

Mr. IVEY.—This one was written August 7th, I believe.

Mr. HALVERSTADT.—Yes, but it was written with reference to this particular model.

Mr. IVEY.—The others seem to be more or less in the nature of circular letters generally sent out.

Mr. HALVERSTADT.—They are descriptive of the value of this car both from the agency standpoint and from the standpoint of the owner. They are letters from the defendant in this case, and they are clearly admissible, I think.

Mr. IVEY.—I don't know, Mr. Halverstadt, what it is you want to prove by these letters. These letters, I am advised, are circular letters, and they are all about the qualities of this Reo machine, and we don't dispute that that was a good, high-class car for that money. I don't know that that question is at issue here in this case at all; I don't so understand it is. We certainly don't deny it was a good car for the money.

The COURT.—Let them go in.

Mr. IVEY.—Note an exception. [94]

Letters dated Aug. 7, 1914, Nov. 28, 1914, Dec. 8, 1914, Dec. 15, 1914, Jan. 13, 1915, Jan. 23, 1915, Feb.

(Testimony of Mrs. Gertrude Harmon.)

2, 1915, and letter attached dated Spokane, Wash., Oct. 24, 1914, received in evidence, marked Plaintiff's Exhibit "10," and made a part of the record herein.

By Mr. HALVERSTADT.—(Q.) Mrs. Harmon, do you recollect the rate of interest provided—I will ask you this first: Do you know where the note now is which was mentioned in that typewritten slip attached to the contract?

A. It's in Portland now. I think it is in Mr. Vogler's possession. It never was turned over to me.

Q. Was the note ever returned to you that you know of? A. No.

Mr. HALVERSTADT.—Have you the note here, Mr. Ivey?

Mr. IVEY.—No, I don't think I have, Mr. Halverstadt.

By Mr. HALVERSTADT.—(Q.) What rate of interest did that note provide for, if you recollect?

Mr. IVEY.—Isn't it in that complaint? No, it is just referred to, that is right.

A. I think it was eight per cent.

By Mr. HALVERSTADT.—(Q.) Eight per cent. And the interest was paid on the note, was it?

A. Do you mean is it paid now?

Q. Was the interest paid as it came due?

A. The interest was always put on our "Parts" account and paid.

Q. Just explain to the jury what you mean by "parts" account.

A. Well, every month we bought so many Reo

(Testimony of Mrs. Gertrude Harmon.)

parts from the Northwest Auto Company to make our repairs on the cars that we fixed in our garage, and they charged us for whatever they shipped us at the end of the month, and they [95] always put the interest from this note on the "parts" account.

Q. It's the bill for these parts you acquired that you call the "parts" account?

A. It is the bill we got for the parts we used the preceding month.

Mr. HALVERSTADT.—I believe you may cross-examine, Mr. Ivey.

Cross-examination.

(By Mr. IVEY.)

Q. Mrs. Harmon, what was that note given for?

A. For a Lozier automobile.

Q. It is your contention now that that note was fully paid by those partial payments that you mentioned and by a final payment along in March, 1915, is it not?

A. No, my contention is that it was paid in February, before the cancellation of the contract, the note was paid in full.

Q. That \$750.00 that you put up with the company, which is provided for in the contract, that is to say, what I mean by "you," I mean the Harmon Motor Car Company, that \$750.00 was finally used by the Northwest Auto Company in paying the balance of this note, was it not?

A. No, not the \$750.00. That was never touched by the note.



(Testimony of Mrs. Gertrude Harmon.)

Q. Well, then, the Northwest Auto Company still have your \$750.00?

A. The Northwest Auto Company had \$1,200.00. That was \$450.00 more than our deposit was supposed to be.

Q. Yes. Now, if the Northwest Auto Company took that \$450.00 of that twelve hundred and applied that on the note, that wouldn't pay the entire note, would it? [96]

A. Within a few dollars. I think that interest was interest that accrued between the time that Mr. Vogler accepted the Winton—

Q. Well, whatever became, Mrs. Harmon, of that \$750.00 that you put up which was provided for in the contract?

A. Mr. Vogler still has that.

Q. And has never given you credit for it?

A. I don't think he has ever given any credit. I don't know whether he has ever given any credit, but he has never returned it.

Q. Have you your books here in court which show your account, I mean the Harmon Motor Car Company account with the Northwest Auto Company?

A. We have the books, yes.

Q. Which shows that account?

A. Yes.

Q. Are you familiar with those books so that you could find the place and show us how the account stood at any particular time?

A. You see, there was several accounts with the Northwest Auto Company. Was our deposit ac-

(Testimony of Mrs. Gertrude Harmon.)

count, which was kept separate entirely from our car account. That was carried under the account of Reo Car Sales and Reo Car Purchases. You would have to balance up between the two to get that. Our deposit account was always kept separate from any other account.

Q. Have you ever had a balance struck of those accounts so as to see just how much you claim that the Northwest Auto Company owes the Harmon Motor?

A. On the difference between our deposit and—  
[97]

Q. Yes, all around, a balance all together; that is, one account might show you are indebted to the defendant and the other account might show that in that respect it was *vice versa*, and so on; but you knew you could tell from your books at any particular time which of you owed the other money, couldn't you? You could always do that?

A. I could tell whether we were indebted on the parts account if I looked up that. Our deposit account always stood as it was.

Q. Are you absolutely sure, Mrs. Harmon, that that \$750.00, which you say was a part of the \$1,200.00, was not used to pay the balance on that note? Are you sure of that?

A. Absolutely positive.

Q. Yes. Well, now, will you give me just exactly the items that were used to pay that note? We will start off with that note—

A. We paid \$600.00 at two separate times, which made \$1,200.00, our check was given for.

(Testimony of Mrs. Gertrude Harmon.)

Q. Have you the dates of those two six hundred dollar items? One is November 18th?

A. I don't understand, Mr. Ivey.

Q. I say, one of those six hundred dollar items was paid on November 18th, I think, and one on December 9, 1914. Now, those two together would make \$1,200.00. Now, that \$1,200.00 deducted from the \$2,394.00 leaves \$1194.00? A. Yes.

Q. Now, what I want to get you to tell me is this: How is that \$1,194.00 paid?

A. \$750.00 credit on the Winton car that Mr. Vogler took back to Portland with him, and \$450.00 excess deposit. [98]

Q. Four hundred and fifty and seven hundred and fifty would make eleven hundred dollars. That, then, would leave—

A JUROR.—\$1,200.00.

Mr. IVEY.—\$1,200.00.

Q. (Continuing:) That would leave, according to your figures, a balance of six dollars in your favor, provided that all of those items, all of those sums were applied on that note. But now isn't it a fact that on the parts account that you owe the company something like six hundred dollars, that is, the Harmon Motor Car Company?

A. I would have to look at the parts account. It wasn't anywhere near six hundred dollars we owed the Northwest Auto Company for that. We paid each month for the parts we got before, and it never ran up to six hundred dollars a month.

Q. Well, did you ever instruct the company, in

(Testimony of Mrs. Gertrude Harmon.)

writing or otherwise, to make the application of this \$450.00 that you speak of, being the difference between seven hundred and fifty and twelve hundred, on the note?

A. At the time Mr. Harmon signed up the new contract we had seven hundred dollars up with the Northwest Auto Company from the preceding year, which Mr. Volger was holding over our 1914 contract. Mr. Harmon gave him a check for five hundred dollars additional, with the understanding that we was to protect him on this note, and when we had the note paid up, all but this \$450.00, then that was to be applied onto the note and the note released.

Q. Then it is your contention that not only this note has been paid, but the parts account was settled, too?

A. The Parts Account was separate from the note.  
[99]

Q. No, was settled, also; that the parts account you are contending—

A. The Parts Account that accrued during the month of February hasn't been settled with the Northwest Auto Company.

Q. Has been or has not?

A. Has not been settled, no.

Q. Well, was the Parts Account that accrued prior to February, 1915, ever paid?

A. All except an account which the Northwest Auto Company had charged against us, called a Suspense Account on Lozier Parts.

Q. How much was that, do you know?



(Testimony of Mrs. Gertrude Harmon.)

A. I couldn't tell you how much an account that was.

Q. Are you in a position at this time, Mrs. Harmon, or could you by an examination of your books, determine whether or not in about the middle of February, 1915, the Harmon Motor Car Company was indebted to the Northwest Motor Company in the sum of about \$530.00 for parts? Could you determine that from your books, or did you have somebody else manage your books?

A. No, I kept the books.

Q. You did keep them?      A. Yes.

Q. Well, would you testify now positively that you did not owe the company at that time about \$530.00 for parts?      A. On Reo parts?

Q. No, parts of machines generally; not the Suspense Account.

A. Outside of the Suspense Account there would be only Reo parts. I would not say just what the amount was we owed the Northwest Auto Company on Reo parts, but there must [100] have been about three hundred or three hundred and fifty dollars' worth of Reo parts had been sent to the company that were defective on 1914 models, and for which they didn't give us credits, and which we were waiting for credits on the bill.

Q. But you are not certain now, as to whether or not, even if the defendant had allowed those items that you are now claiming, but you are not even then certain but that the Harmon Motor Company would be still owing the defendant about \$530.00?

(Testimony of Mrs. Gertrude Harmon.)

A. They would be still owing about \$250.00 probably.

Q. If those—

A. If the credits had been put through as they should have been.

Q. Did you ever write the defendant company and make a claim for those returned articles that you speak of?      A. The defective parts?

Q. Yes.

A. There certainly will be in the correspondence a letter where we sent the parts back. You don't make any claim on account of returned parts. You return them and send the number of the car they were taken out of, and the company passes on whether they were defective or not, and if they are, they send you the credit for them. There is no claim put through for defective automobile parts.

Q. Then you admit at this time, then, that the Harmon Motor Company was indebted in the sum of at least two or three hundred dollars?

Mr. HALVERSTADT.—Just a minute. Your Honor, I haven't objected to this testimony until this time, but I want [101] to now for this reason: If you will examine this contract, even if you assume what counsel is seeking to draw out is true, it is not an excuse for cancellation of the contract. And further, the contract provides expressly in what contingencies it can be cancelled, and this isn't one of them. Now, they would merely have a right of action for the recovery of that sum, against which at that time they held \$750.00 deposit, which, in the contract, is

(Testimony of Mrs. Gertrude Harmon.)

provided shall be for the faithful performance of the contract. But the contract does not provide, does not contain any provision giving the company, the defendant, the right to cancel that contract if there shall be any overdue bill on this Parts Account, consequently it is utterly immaterial whether the company did or did not owe a couple of hundred dollars for Parts Account, because the defendant here is making no claim for any sum which is due the defendant; in other words, there is no pleading here of a counterclaim, or otherwise, asking for any affirmative judgment against the plaintiff; and I object to the testimony, and I think it is entirely irrelevant and immaterial.

The COURT.—Overruled.

Mr. IVEY.—Read the question, please.

Q. (Question repeated.)

A. Our Parts Account probably would have been that for the month, our February Parts Account, which may have been that sum of money.

Q. Now, did you give the defendant company any instructions as to how to apply this \$450.00? I think you answered that question once, but I have forgotten what your answer was. [102]

A. Yes. At the time that Mr. Vogler received the additional \$500.00 the instructions and idea then was to apply it on the note.

Q. When was that \$500.00 received?

A. That was given to him at the time that the 1915 contract was signed up in October, 1914.

(Testimony of Mrs. Gertrude Harmon.)

Q. That is a part of that twelve hundred you speak of?

A. That is part of the twelve hundred, yes.

Q. And you say it was to be applied on the note?

A. Yes.

Q. Now, when you sent the other two six hundred dollar items down you sent them with a letter, did you?

A. The checks?

Q. Yes.

A. I suppose so. I don't recall that.

Q. And when they wrote you and asked you why you didn't hurry up and pay the note, right at that time you had overpaid the note, hadn't you?

A. No, not until Mr. Vogler accepted the Winton the note wasn't paid; not at the time they wrote me about that.

Q. I see. Now, returning to your testimony in regard to the machines that you had gotten contract for the sale of at the time this contract was cancelled, you said, I believe, that you had gotten nine already from the company?

A. Yes.

Q. All nine of those had been disposed of, I believe you said?

A. Yes.

Q. And how many more machines did you have contracts out for the sale of?

A. Fifty-three all together. [103]

Q. 53?

A. Yes. Oh, more than the nine? I take that back. Fifty-three including the nine.

Q. I did not understand you?

A. I say, fifty-three including the nine.



(Testimony of Mrs. Gertrude Harmon.)

Q. In other words, then, you had contracts out for the sale of forty-four machines?   A. Yes.

Q. That were not delivered?   A. Yes.

Q. Who were those contracts with?

A. They were with my agents. This Mr. Burke at Everett,—

Q. There were two or three of those contracts, I believe, filed this morning, and those are the three (showing)?   A. Yes.

Q. One was the Burke?

A. Burke at Everett, yes.

Q. And the other the Poole contract, and the other of those Knutzen Bros. contract?

A. That is their Skagit County contract.

Q. Yes. Now, when you say that you had contracts out for forty-four you include all of the cars that are mentioned in these three different contracts, I suppose?   A. Yes.

Q. I notice in the Snohomish County contract there are two—have you had these up so you know right off what they are?

A. There are twenty on the Snohomish County.

Q. There are twenty on the Snohomish County?

A. Yes; and twelve in Mr. Knutzen's Skagit County contract; and three from Mr. Poole in Clallam County. [104]

Q. That makes thirty-five, doesn't it?

A. Yes.

Q. Now, that leaves nine yet unaccounted for?

A. Mr.— the Knutzen Bros. up at Burlington

(Testimony of Mrs. Gertrude Harmon.)

towards the latter part of February took on Whatcom County with an additional eight cars.

Q. Where is that contract?

A. That wasn't made out yet. At the time the cancellation came it was just agreed upon, there was a verbal agreement between us, but I hadn't put it into a written contract yet.

Q. That would be forty-three. Then one more, isn't there?

A. No, you see you are counting those already delivered to my agents.

Q. I started with fifty-three, I think.

A. You want to get fifty-three?

Q. Yes.

A. Well, I had three retail sales made, a Mr. Wright, a Mr. Cooley,—and who was the other one? I don't recall his name now—Mr. Thornton would know—that I returned their money to them at the time of the cancellation. They were retail sales.

Q. Then there were just about three return sales all together?

A. That I returned the money on, yes.

Q. What I am getting at, you had agreed to sell three on retail, and you couldn't deliver those so you returned the money?

A. I returned the money, yes.

Q. Just on those three?

A. I only returned money on three cars, yes.  
[105]

Q. Just three?      A. Yes.

Q. And all of the other sales that you speak of

(Testimony of Mrs. Gertrude Harmon.)

were these agency sales represented by these contracts and that contract that had not yet been signed up? A. Yes, they were agency sales.

Q. Mrs. Harmon, you say that you had been in this business for quite a while, some two or three years prior to the entering into the contract with the defendant company. What did you say the name of your company was before you changed it to Harmon Motor Company?

A. McKenna & Harmon.

Q. Well, I will call it the McKenna Company, then, just for brevity. How many cars did you handle in the McKenna Company, or the Harmon Motor Car Company, either one, per year usually?

A. In 1914 we sold a hundred and thirty-three cars of different makes, new cars. That wasn't counting the old cars.

Q. I see. What was about the average price of those cars, that hundred and thirty-three?

A. The average price—we had the Reo at ten-fifty, or ten-seventy-five, and had the Interstate—there was about twenty Interstates sold that year. There was one for twenty-four fifty and one sold for thirty-five hundred. And then we sold the Lozier that year for Mr. Vogler. We sold them for twenty-two fifty and thirty-two hundred, the Lozier Four and Six. I couldn't tell you exactly, but it was approximately that. Then we sold a little car, the Grant, we sold for between five and six hundred. [106] And Reo trucks. We sold four Reo trucks. They sold for about eighteen hundred.

(Testimony of Mrs. Gertrude Harmon.)

Q. Now, was that the year 1914 and '13?

A. That was 1914.

Q. That was the 1914 season?      A. Yes.

Q. When you say a hundred and thirty-three you mean for the entire year of 1914?      A. Yes, surely.

Q. What was the financial condition of your company at the beginning of 1914?

A. Before we entered the winter of 1914, you mean, or in January, 1915?

Q. No, I am talking about January, 1914.

A. January, 1914?

Q. Yes, that's right. About what was its financial condition?

A. Heavens, I don't know. I couldn't answer that. It was all right.

Q. Did you have some money ahead at that time?

A. Yes.

Q. You know about how much?

A. No, I couldn't tell you.

Q. Could you tell me generally about how much your assets exceeded your liabilities at that time.

A. In January, 1914?

Q. Yes, just approximately; I don't mean exactly?

A. Oh, probably three or four thousand dollars.

Q. Three or four thousand. And can you tell me now about the relative standing of your assets and liabilities January 1st, 1915? [107]

A. Why, of course our assets were a great deal more.

Q. Your assets were more?

A. In 1915, yes.



(Testimony of Mrs. Gertrude Harmon.)

Q. In what did your assets consist?

A. In machinery and equipment of every kind. We had four or five times as much as we did in 1913; more than that.

Q. Four or five times as much?      A. Yes.

Q. Did you have any ready cash?

A. Yes. Had our bank balance, which we always—

Q. Had a good-sized bank balance?

A. I don't recall the exact amount of our bank balance. It varied a good deal. It does in the automobile business.

Q. You kept a good bank balance right along, did you?      A. Fairly good, yes.

Q. What do you mean by a good bank balance, couple of thousand?

A. In the neighborhood of fifteen hundred or two thousand, yes.

Q. Well, in that case, Mrs. Harmon, why did Mr. Harmon write the company a letter and say that he wasn't able to pay the balance of that note some time along in October or November? There were two letters about that, weren't there?

A. About the six hundred dollars?

Q. Yes. You know there are quite a number of letters here that our company wrote yours saying they would like mighty well to have that note paid up, and you answered by saying that your company—or by saying that you were hard pressed, couldn't make it, isn't that a fact? There are some such letters in there?

(Testimony of Mrs. Gertrude Harmon.)

A. Yes. At the time we did give them six hundred dollars at [108] two different times. Probably at the time we wrote them we didn't happen to have that six hundred in the bank.

Q. Now, will you find in your books, if you can, that part of the books which show the assets and liabilities of your company in 1914? Can you find that for us?

A. I have no account of these assets on the books. That would only come under—for instance, shop equipment would be bought from time to time; as we need something we would buy it.

Q. Your books, then, wouldn't show the net worth of your company at the beginning of 1914?

A. Those books don't show it. They are opened up by another bookkeeper besides me, and there is no account in there that shows side by side the assets and liabilities of the company.

Q. Well, could you now give us the data upon which you based your statement that your company was worth three or four times as much at the beginning of 1915 than it was in the beginning of 1914?

A. Because we had bought that much equipment during the following season.

Q. Your books will show what equipment you bought?

A. They show that we bought, yes.

Q. Could you make us out a statement?

A. I could if you gave me three or four hours to do it. Equipping an automobile garage you buy from a dozen different parties. More than that. You

(Testimony of Mrs. Gertrude Harmon.)

buy your machinery, and your parts, and your tools, and your furniture.

Q. And your books will show those different things?

A. In different accounts. I suppose I could make up a statement. [109]

Q. After your testimony is over we will get you to make such a statement. What I want to get is a statement of the assets and liabilities of the company January 1st, 1914, and a similar statement January 1st, 1915, is what I am trying to get at. Now, you sold a hundred and thirty-three cars, you say, in that year. Do you know, Mrs. Harmon, about what per cent is made by the average dealer in Seattle handling cars on the gross output, what per cent they make?

A. I think he would make about fifteen per cent.

Q. You think he would make about fifteen per cent net? A. Yes.

Q. Now, that is what nearly all of them make about fifteen. Do you know of a single institution in this city that makes a fifteen per cent profit on their volume of business? Can you give me the name of a single one?

Mr. HALVERSTADT.—I object because that is not proper cross-examination. I have not gone into the net returns with her.

Mr. IVEY.—I think it is, if your Honor, please. What we are getting at here, if counsel is undertaking to prove anything at all he is undertaking to prove that they would have made certain profits

(Testimony of Mrs. Gertrude Harmon.)

during that five months. Now, I am trying to reduce this to something concrete so we can all have something to work on. Now, the witness says that at the end of 1915 their assets were four or five times what they were at the beginning. I am asking the witness to fix up that data on that and get it later. But now I don't know how the plaintiff arrived at this [110] thirteen thousand dollar claim. If counsel wants—I will withdraw that question and ask this question:

Q. How do you figure out, Mrs. Harmon, that you have been damaged in the sum of \$13,135.00?

Mr. HALVERSTADT.—Object for the same reason. Mrs. Harmon was asked nothing whatever about figures. Those are matters which were brought out by other witnesses. It is improper cross-examination.

Mr. IVEY.—Well, Mrs. Harmon is bookkeeper, she says.

Mr. HALVERSTADT.—All right, but she wasn't asked about that. She may be a good many things, but that would not justify a cross-examination over matters on which she was not examined in chief.

The COURT.—I think the objection to the question as it is propounded should be sustained.

Mr. IVEY.—I would like an exception, your Honor.

The COURT.—Yes.

By Mr. IVEY.—(Q.) When Mr. Vogler came up here, Mrs. Harmon, you had quite a talk with him about the conduct of your husband, did you not?



(Testimony of Mrs. Gertrude Harmon.)

A. Yes.

Q. When did you say you got a divorce from him?

A. I haven't ever gotten a divorce from him.

Q. I thought you did say you had. Well, he was indulging at that time in a good deal of joy-riding, wasn't he?

A. No, I don't believe he was indulging in joy-riding, not that I know of.

Q. Do you know what he was in jail for that time he sent for Mr. Vogler to come up here and sort of help him out?

A. For being with two other men, yes. [111]

Q. For being with two other men?

A. Do you want me to state the charge?

Q. Yes, that is what I was really trying to get. I don't mind telling you what I am driving at. That I want to show by competent evidence that one of the reasons why Mr. Vogler discharged Mr. Harmon, or why he wanted the contract cancelled, was that Mr. Harmon's conduct was pretty bad then, and it was—I don't know, it isn't a matter of record in this case, what he was charged with, or how he happened to get in jail, and that is what I *ask* asking you about, what he did get in jail for, if you know?

Mr. HALVERSTADT.—If your Honor, please, that involves again a question of cancelling the contract for such cause as that. In the contract, if you will notice it, it is expressly provided upon what contingencies the contract may be cancelled. Now, these aren't any of them. Now, that contract contains a number of different and separate clauses. It is not

(Testimony of Mrs. Gertrude Harmon.)

one entire contract, but it is a contract which has separable clauses.

Mr. IVEY.—I think, if your Honor please, we certainly should be permitted, under this clause with reference to reallottment of territory, to introduce this evidence. Certainly under that, if not on general principles, because your Honor would not hold that as a matter of law we would have to let Mr. Harmon continue acting as our selling agent if he was not conducting himself in such a manner as would *entitled* him to it.

The COURT.—I think that would be a matter of defense. This witness wasn't asking anything about this on direct examination. Counsel did make a statement to the jury. [112]

Mr. IVEY.—As I recall it, your Honor, and the reason I happened to go into it, because Mrs. Harmon said that she told M. Vogler all about the conduct of her husband when he was up here.

The COURT.—Well, you just asked her that, but not on direct.

Mr. IVEY.—That was in answer to Mr. Halverstadt's question. Mr. Halverstadt asked Mrs. Harmon, as I recall it, whether or not when Mr. Vogler came up here, just prior to the time this contract was cancelled, she told Mr. Vogler about Mr. Harmon's conduct, and she said she did.

The COURT.—I didn't recall that.

Mr. HALVERSTADT.—I think probably that is true.

The COURT.—She may answer the question.

(Testimony of Mrs. Gertrude Harmon.)

By Mr. IVEY.—(Q.) Well, you did go into the details, then, with Mr. Vogler about that matter?

A. Mr. Vogler know before he ever talked to me all about it. I think Mr. Vogler saw Mr. Harmon before he ever saw me.

Q. Now, at the time this contract was made did you yourself have anything to do with the making of it? I mean to say, did you see Mr. Vogler or have any talks with him about it?

A. About the 1915 contract?

Q. Yes, about the 1915 contract.

A. I don't recall that I spoke to Mr. Vogler about the 1915 contract. I may have when he was in Seattle. He was in Seattle a good deal at that time.

Q. That contract was signed "Harmon Motor Car Company, by F. E. Harmon"? A. Yes.

Q. "F. E. Harmon, President," it says?

A. Yes, sir, he was president. [113]

Q. That was your husband? A. Yes.

Q. And he was the one who negotiated for this contract?

A. He was the one that signed it, yes.

Q. After Mr. Vogler had been down to see Mr. Harmon, when he came up here at Mr. Harmon's request at the time Mr. Harmon was in jail, Mr. Vogler came down and had quite a talk with you about the matter, did he not?

A. He talked with me several times, yes.

Q. And did he not tell you, Mrs. Harmon, that if you could raise a sufficient sum of money to carry on this business that he would let you try it for a while?

(Testimony of Mrs. Gertrude Harmon.)

A. Mr. Vogler didn't tell me to raise any sum of money, and didn't say anything to me about canceling the contract, at the time he spoke to me.

Q. You don't know what conversation he had had with Mr. Harmon?

A. I have no way of knowing what he said to Mr. Harmon.

Q. Mr. Harmon was still at that time as much President of the company as he was at the time this contract was made, was he not?

A. I don't understand your question?

Q. Mr. Harmon was still President of the company at the time he got in jail?      A. Yes.

Q. That is, assuming that it was a corporation?

A. Yes.

Q. And he had the general management of the business of the company still in hand, as much as he ever did?      A. Yes.

Q. Now, did you not refer Mr. Vogler to the Northern Bank & [114] Trust Company to make inquiries as to your standing and your credit, and so forth?

A. I didn't refer him. Mr. Vogler knew who we had been doing business with.

Q. Didn't he ask you if he might go down and ask Mr. Collier of the Northern Bank & Trust Company, what your standing was?

A. I don't recall that he did, but he may have. I don't know.

Q. Mrs. Harmon, did you say, going back to that Parts Account, did you say that you paid the Parts



(Testimony of Mrs. Gertrude Harmon.)

Account every month?     A. Yes.

Q. Will you find that Parts Account in your book for me? Which one of these books is it, the big one? Will you find it, please, for me, and I will be obliged to you (handing book to witness)? Did you find it, *Mr. Harmon*?     A. Yes, I have it.

Q. Let me see that, if you please. See if I understand it. This, I understand, is the checks that you sent, I believe, and the left-hand side is the charges?

A. Yes.

Mr. IVEY.—I want to get Mr. Clark to take a look at that.

Mr. HALVERSTADT.—Your Honor, in order to save the record, but at the same time to save time, may it be understood that the same objection I made a while ago to this testimony be considered to all of this testimony of this witness?

Mr. IVEY.—Quite so. I am willing to stipulate.

The COURT.—To this line of testimony?

Mr. HALVERSTADT.—That which comes within the objection that I made.

Mr. IVEY.—Yes. [115]

Q. Mrs. Harmon, aren't you right sure or are you right sure that Mr. Vogler did not tell you that he would cancel that contract with the Harmon Motor Company, that he would have nothing more to do with the Harmon Motor Company, but that if you could get somebody else to finance you he might make some contract with you? Did you not have that conversation with him?     A. No, I did not.

Q. Well, you are sure of that, are you?

(Testimony of Mrs. Gertrude Harmon.)

A. Absolutely sure; yes.

Q. Well, did you ever write to Mr. Vogler, or telegraph him, or tell him, that you were about to get some one to go in with you and would like to have that contract and run it yourself?

A. After the cancellation of the contract?

Q. Before or after?

A. I think there was some one wanted to go in business with me after they cancelled it, and I telegraphed to him; but not before.

Q. Is this the telegram that you sent (showing paper to witness)? A. Yes.

Mr. IVEY.—I would like to have this marked for identification as Defendant's Exhibit "A." Mr. Halverstadt, have you seen this telegram?

Mr. HALVERSTADT.—I don't know. I have *one* seen one telegram. (Examining paper.) We object to this telegram because it is a telegram that is dated after the cancellation of the contract. In other words, it had absolutely no bearing on anything in this case. [116]

Mr. IVEY.—This telegram, your Honor please, is dated February 24th. The cancellation took place about February 12th, I think.

Mr. HALVERSTADT.—The cancellation was sent on the 22d.

Mr. IVEY.—This witness said she didn't have any talk with Mr. Vogler about getting someone else to go in partnership with her, to finance her.

The COURT.—Let me see the telegram. (Paper handed to the Court.) Sustained at this time.

(Testimony of Mrs. Gertrude Harmon.)

Mr. IVEY.—Like an exception, your Honor.

Q. Mrs. Harmon, returning to this payment of these parts, will you show me there where the checks were sent?

A. These here is the checks over on this side (showing).

Q. These are checks on the right-hand side?

A. Yes.

Q. July 10, 1914, \$25.00. Was that a check sent to the defendant company?

A. Where is that?

Q. Here. You sent them a check at that time for \$87.25? A. Yes.

Q. And on July 14th, you sent them another check for \$1.12.

A. That is the journal. I presume that must have been a credit.

Q. Then on July 27, 1914, you put on another credit memorandum, \$28.38. August 31, 1914, still another credit item of \$3.70. And on September 30, 1914, and October 31, 1914, some more credit items, But you don't find those checks that you sent them, do you?

A. I don't know whether those are checks or credit entries. I believe those are credit entries.

Q. In other words, there is nothing in this book to indicate [117] you have sent a check?

A. Let's see—they are all marked "J." Yes, it is either a check or credit memo. I believe this is the only credit memo. That is marked "Credit Memo" here.

(Testimony of Mrs. Gertrude Harmon.)

Q. Well, can you find from any book that you have in court here now those checks that you sent down there on the Parts Account?

A. Yes, the cash-book will show it.

Q. Which one is that?

A. That big one there; this is the one here (indicating). What checks did you want to find out, Mr. Ivey?

Q. I want to know what amounts you sent, say from October, 1914, up to February, 1915, on the Parts Account, what checks you sent?

A. Here is starting October (showing).

Q. Just give me the dates. Is that October?

A. Yes, this is starting October, 1914.

Q. All right. There is a difference between our accounts here of about six or seven hundred dollars, that is what I am getting at.

A. Do you mean on the account—

Q. We have about four or five hundred dollars against you on the Parts Account, and we used part of that twelve hundred dollars to pay that, and that left about five or six or seven hundred dollars of the note unpaid, that is what I am trying to get at. You think you sent checks to cover the Parts Account?

A. No, I didn't say the Parts Account was paid at the time of the cancellation. I admit the current accounts part may have been about five hundred dollars, and checking off the [118] credit memos, our defective parts, would have brought what we actually owed the Northwest Auto Company to about \$250.00.



(Testimony of Mrs. Gertrude Harmon.)

Q. I understood you said you sent them checks about once a month?

A. If we bought parts we paid for them by the 10th of the next month. We might not have bought any parts at that time. I don't know.

Q. Can you find from any book you have in court just exactly the balance that your company owed the defendant company in February, 1915, on the Parts Account?

A. The Reo parts ought to give it.

Q. Are they footed up anywhere?

A. No, I don't believe they are footed up anywhere. I never went through and footed up the bills. After that contract was cancelled I dropped the books and let it go at that.

Q. All right, we will foot them up a little later.

Mr. IVEY.—I think I have no further questions to ask the witness.

Redirect Examination.

(By Mr. HALVERSTADT.)

Q. Mr. Ivey, there is a letter I should have asked about on direct?

Mr. IVEY.—All right.

By Mr. HALVERSTADT.—(Q.) Mrs. Harmon, I don't know whether I misunderstood you on cross-examination or not. I understood you to say that the only automobiles which you have sold were those sold to your agents on contracts?

A. No, I didn't say that, Mr. Halverstadt. [119]

Q. Now, in addition to those which had been sold to your agents on contracts how many specific sales

(Testimony of Mrs. Gertrude Harmon.)

do you remember where you can recall the names of the purchaser?

A. We sold three that we gave the money back on. One to Mr. —do you want me to name off the name?

Q. If you will?

A. Mr. Vanlinda, on Vashon Island; Mr. McClenan—I think it is John McClennan. He is a machinist in town.

Q. Where does he live?

A. He is in Seattle. Mr. Lysons, the attorney.

Q. Sitting right here by Mr. Piles?

A. Yes. And a Mr. Cline.

Q. Where does he live?

A. He is a Seattle man.

Q. Any others you remember?

A. A Mr. Cats in Port Townsend.

Q. Any others? Who were the three to whom—

A. Mr. Wright, Mr. Cooley and I didn't recall the other name of those three.

Q. Is that H. D. Cooley, the attorney in Everett?

A. In Everett, yes.

Q. Now, then, of those three, of those names you have mentioned, to how many did you have to return the deposit? A. Three.

Q. Do you remember the names of the three?

A. That was Mr. Wright, and Mr. Cooley, and I didn't recall the third name.

Q. Is it Mr. Cats?

A. Yes, it was Mr. Cats.

Q. Those are the three. Now, I believe counsel asked you on [120] cross-examination whether at

(Testimony of Mrs. Gertrude Harmon.)

the time Mr. Harmon was in jail he was not manager of the company, or president, something of that sort. Now, did you or did you not at that time take over whatever stock he had in the company?

A. Yes, I did.

Q. Do you remember approximately the date that you did that?

A. It was the first week in February. I don't know the exact date.

Mr. IVEY.—Which stock are you talking about?

Mr. HALVERSTADT.—The stock in the McKenna-Harmon Company.

Mr. IVEY.—I don't quite see what that has to do with it. Are you talking about the stock—

Mr. HALVERSTADT.—The capital stock.

Mr. IVEY.—The capital stock in the McKenna-Harmon Company?

Mr. HALVERSTADT.—The certificates were made out in the name of the McKenna-Harmon Company, the original certificates.

Q. You took an assignment of those? A. Yes.

Q. And at the time of that assignment, and after that, did he have any connection whatever with the Harmon Motor Car Company?

Mr. IVEY.—I object to that, your Honor please, unless that is brought to the knowledge of the defendant, because we wouldn't know about this interchange of stock as between these parties.

The WITNESS.—Mr. Vogler did know.

The COURT.—You may state whether he had any connection with that concern after that.

(Testimony of Mrs. Gertrude Harmon.)

By Mr. HALVERSTADT.—(Q.) Did Mr. Harmon have any connection with the concern? [121]

A. Not after that time, no.

Q. Never has had since? A. Never has since.

Q. Were those matters told Mr. Vogler when he was here in the first part of February, 1915?

A. Yes.

Q. Did you tell Mr. Vogler Mr. Harmon had no connection with it?

A. Well, Mr. Vogler was in town at the time Mr. Harmon gave me the assignment.

Q. And Mr. Vogler knew about that?

A. It was almost along his instructions it was done.

Q. And he was, you say, what officer of the defendant company? A. President.

Q. And what officer was he at that time?

A. President.

Mr. HALVERSTADT.—I will offer in evidence Plaintiff's Exhibit "12." I will have to prove it first.

Q. Calling your attention to a letter marked Plaintiff's Exhibit "12," I ask you whether that was sent to the Harmon Motor Car Company?

A. Yes, it was.

Q. By whom?

A. Northwest Auto Company.

Mr. HALVERSTADT.—I offer the letter in evidence.

Mr. IVEY.—No objection.

The COURT.—Admitted.



(Testimony of Mrs. Gertrude Harmon.)

Letter referred to received in evidence, marked Plaintiff's Exhibit "12" and made a part of the record herein. [122]

By Mr. HALVERSTADT.—(Q.) When that draft came in was it taken care of? A. Yes.

Q. Through that bank?

A. Through the Northern Bank & Trust Company, yes.

Q. Through the Northern Bank & Trust Company. Counsel asked you whether Mr. Vogler did not ask you whether you had any objection to his going to the Northern Bank & Trust Company. Do you recall the occasion when any such conversation took place, if it did take place?

A. If he spoke to me anything about going to the bank it would have been in the first week in February, when he was up to see me.

Q. The point is this: Do you recall such conversation taking place?

A. I recall that Mr. Vogler asked me what arrangements I had at the bank, and how the bank had treated me, and was going to treat me; but I don't recall that he asked my permission to go to the bank.

Q. If he did ask you would you have declined to let him go?

A. Why, no, it wouldn't have done any good. If he wanted to go he would have gone, that's all there was to it.

Q. Would you have been unwilling he should go to the bank?

(Testimony of Mrs. Gertrude Harmon.)

A. Why, no. Mr. Collier was very favorable to us.

Mr. HALVERSTADT.—That is all.

Recross-examination.

(By Mr. IVEY.)

Q. Mrs. Harmon, were those drafts sent to the Northern Bank [123] at your request?

A. Yes.

Q. Well, do you recall that incident when Mr. Collier down there at the bank let Mr. Harmon have a car without first paying the draft, and that Mr. Vogler raised so much noise about it? Remember that, along in October, 1914, somewhere along there?

A. I don't recall anything of that sort.

Q. You don't remember that incident at all?

A. No, I do not.

Q. Mr. Vogler came up here and found out that the Northern Bank had let Mr. Harmon have that car without Mr. Harmon first having paid the draft, and got pretty sore about it and made the Northern Bank pay for it?

A. The Northern Bank had paid the drafts. No, I don't recall anything of that.

Q. Do you know what became—did Mr. Harmon not sell to Mr. Collier one of those Loziers?

A. No, he sold Mr. Phillips a Lozier.

Q. Mr. Phillips, who is connected with the bank?

A. Yes.

Q. The Northern Bank & Trust Company?

A. Yes.

Q. But you don't remember that other incident?

(Testimony of Mrs. Gertrude Harmon.)

A. No, I don't remember that other incident.

Mr. IVEY.—That is all.

(By Mr. HALVERSTADT.)

Q. Did Mr. Vogler make any objection to your doing business that way, your doing business regularly through the [124] Northern Bank & Trust Company?

A. Why, no, he never made any objection. It was understood.

Q. If there was any objection on his part to your doing so did you know anything about it?

A. No.

Mr. HALVERSTADT.—That is all.

Mr. IVEY.—That is all.

(Witness excused.)

**Testimony of J. M. Thornton, for Plaintiff.**

J. M. THORNTON, a witness produced on behalf of the plaintiff, being first duly sworn, testified that he was in the automobile business and had been in this business for nine or ten years, and that he had been manager of the McKenna-Harmon Company three or four months before it changed its name to Harmon Motor Car Company, and that he worked for these two companies about two years, terminating his services on February 22, 1915, and that he attended to the business of this company in the absence of Mr. and Mrs. Harmon, being familiar with the details of the same; that during the season of 1914 the Harmon Motor Car Company sold about one hundred and thirty-three cars, this number including four trucks; that the medium-priced car was put

(Testimony of J. M. Thornton.)

on the market in 1914 and that it created a demand for cars of that kind, saying: "Well, in 1914, in fact, years before there had been more [125] or less higher-priced cars, and beginning of the season of 1914, why, they began to build a lighter car; in fact, the price at that time was lower somewhat; and the cars began to have electric starter, and lights, and those things, modern conveniences, which give women and everybody an opportunity to use cars. In that way, why, it created great demand, we sold more cars, and ever since, why, the automobile business has been growing right ahead, which everybody probably knows"; and said that the sales during the season of 1915 of cars of this kind just about doubled that of the preceding year, and has doubled practically every year since, and as an automobile salesman he attributed that increase to the lowering in price, and also to the modern equipment; and that the Harmon Motor Car Company had at the time this contract was cancelled one of the nicest salesrooms in the automobile district of Seattle; that it was right in the center of the automobile district, on a corner, giving it two sides up and down half the block, and it was easier for an automobile agency which had been established several years to sell cars, than a new agency; that it carried a service department, showroom and shop; that this company advertised extensively and tried to keep up with its competitors in advertising; that there was a good demand for the Reo car in 1915, and that the Buick, Overland and Studebaker were the principal com-



(Testimony of J. M. Thornton.)

petitors of the Reo; that the price of the Reo was less than that of the Buick, which made it easy for the Reo to be sold; that the price of an automobile was a factor entering into sales. That the company got one car from [126] the defendant right after the contract was signed up; that the next lot of cars came in about the 27th of January, 1915, there being four in this lot, and that the Harmon Motor Car Company had no difficulty in disposing of these; that they were shipped with a draft attached, the draft being sent to the Northern Bank & Trust Company; that the Harmon Motor Car Company had an arrangement with the Northern Bank & Trust Company respecting a loan of the bank to take up bills of lading of this kind and that this arrangement had been in effect since the Harmon Motor Car Company had been in business, and was in effect at the time the contract was cancelled; that the next shipment of cars came about the 19th of February, and that the drafts were taken up promptly; it was right around the time that the contract was cancelled; that up to the 22d of February, 1915, the same fifty-three cars had been sold by the Harmon Motor Car Company that the plaintiff G. M. Harmon testified about and under the same terms as she stated. That he had made arrangements to establish an agency in Kittitas County; that the contract had not been definitely signed on the 22d, but that it was ready to close, and he had subsequently closed it for the Puget Sound Motor Car Company about the 17th of March. The contract of that agency was for four

(Testimony of J. M. Thornton.)

cars. That the witness telephoned a number of times to Portland demanding that cars be sent up, and that the parties to whom the Harmon Motor Car Company had sold cars were making demands for deliveries, and that this fact was communicated to the defendant; and the following proceedings were had: [127]

Q. Mr. Thornton, if deliveries had been made of cars as specified in this contract, Plaintiff's Exhibit "3," as follows: October, two; November, one; December, four; January, eight; February, twenty; March, twenty; April, twenty; May, fifteen; June, ten; if, I say, deliveries of cars had been made according to that schedule how many cars could the Harmon Motor Car Company have disposed of before the expiration of this contract on the 31st of July, 1915?

Mr. IVEY.—Object to that as calling for a conclusion of the witness. He may testify as to what contracts he had. I believe he has done that. And if we admit those machines would be taken here the ground would be covered. I don't believe the witness is qualified to say what would have happened if something else had happened. I submit that to your Honor.

The COURT.—I think he may give his conclusion as to probable additional sales. You can find out what basis he has for such conclusion.

Mr. IVEY.—I would like an exception.

Mr. HALVERSTADT.—Answer the question, Mr. Thornton.

(Testimony of J. M. Thornton.)

A. Well, during the season I would be safe in saying that we could have disposed of at least to a hundred and twenty-five Reo cars that season; for the simple reason that we had—all arrangements had been made, we had been advertising extensively, had been waiting for cars, working hard, we had lots of pep in the firm, nobody lying down that I know of. I know I was on the job night and day myself, and also my sales force, and we worked very hard, and there is no reason in the world why we [128] couldn't have practically doubled our sales of what we did in 1914, because everybody did.

The witness then stated that the Reo was a salable car; that the 1915 Reo had an advantage over the 1914 because it "had lots of power, and is easier riding, a larger car, more room, and the price was a whole lot less." He did not believe there was a prettier car on the market. That as an automobile salesman he would say that the car was a good one and easy to sell, and at the time the contract was cancelled there was a big demand for that car. That they had no trouble "as far as break-down with the Reo, as far as defective parts, we had very, very little considering the amount of business that we did"; that "we had lots of prospects, and, in fact, I believe that if we had had the cars we could have sold at least twenty or twenty-five cars right outright, right out of our showroom when they came in." That he meant by the term "outright" that they could sell the cars in the shop without going out to solicit the trade. That he was in Seattle when Mr. Vogler came here

(Testimony of J. M. Thornton.)

in February, 1915, and that the company owed the defendant some money on the balance of the note that was mentioned in Mrs. Harmon's testimony, and that an old Winton car was turned over to the defendant company for \$750.00 to apply on the balance that was due on this note, that Mr. Vogler was in Seattle about a week at that time, and he saw him off and on quite frequently, and that Mr. Vogler said nothing to him about the cancellation of the contract. At this point the attention of the witness was directed to a clause in the contract which [129] read: "The dealer (referring to the Harmon Motor Car Company) agrees to accept delivery of said Reo automobiles according to the following schedule, and to furnish detailed specifications at least thirty days prior to the date of delivery," and said that the word "specifications" as used in the contract meant the kind of model of the car, as a touring car or a roadster, for instance. That when he would make demands on the defendant he would tell them to ship "Reo cars regardless of what they had, we would be glad to have a roadster, touring car, or Six, if we could get it. We never got a Six"; that he telephoned them a number of times and told them to ship "all they could give us"; that these telephone conversations took place between October, 1914, and January, 1915; that the principal difficulty that the Harmon Motor Car Company had was in getting deliveries of the Reo cars.

The answer to the question as to the kind of service the Harmon Motor Car Company gave its customers



(Testimony of J. M. Thornton.)

was ordered stricken by the Court at the instance of counsel for the defendant. The Court also refused to permit the witness to testify as to whether the character of services which an agency rendered to its customers had anything to do with the sale of cars, to which an exception was noted, and also ruled that it was not necessary to make an offer as to what the answer of the witness would be.

On cross-examination the witness testified that under the terms of the contract that the Harmon Motor Car Company had with the defendant company nine cars had [130] been delivered, and that the Harmon Motor Car Company had contracts outstanding for fifty-three; that the contracts that had been reduced to writing with the Harmon Motor Car Company's customers called for forty-three; and that there were therefore forty-four cars that the Harmon Motor Car Company had agreed to sell that were not delivered by the defendant company; that the contracts that the Harmon Motor Car Company had with its customers were the same that were referred to in Mrs. Harmon's testimony.

He said that when he called up the defendant company, which he began to do along in September or October of 1914, he talked with Mr. Clark, and Mr. Clark said that the defendant was "doing what they could to get cars and they would ship us cars as soon as possible," and that he didn't doubt but that Mr. Clark was doing the best he could to get the cars; and the following proceedings took place:

Q. Don't you know, as a matter of fact, that every-

(Testimony of J. M. Thornton.)

body, in the season of 1914, practically everybody, had difficulty filling the orders for cars?

Mr. HALVERSTADT.—Just a minute. I want to make this objection, your Honor: If you will notice the contract, it provides this—

The COURT.—I think the objection should be sustained. We are not concerned with everybody.

That the sale of this type of car in 1915 was double that of 1914, and that the Buick, Overland and Studebaker doubled their sales in Seattle. [131]

The witness further stated that the Harmon Motor Car Company went out of business shortly after this contract was cancelled; that the Harmon Motor Car Company was solvent up to the time the contract was cancelled, and that it had gone out of business because they could not get any Reo cars to sell. That it had a great deal of property along about the 1st of January, 1915. The financial condition of the company was about the same in January, 1915, as it had been theretofore, but he could not say it was in splendid financial condition. He was in close touch with its business, and had been in its employ about two years. The Harmon Motor Car Company was the successor in interest of the McKenna-Harmon Company. The financial condition of the company in January, 1914, was very good, and they had made some money in 1914. They were a good deal stronger in January, 1915, than they were in January, 1914, in that they had spent lots of money in getting ready to do business in 1915, and that was what they were figuring on; that he thought, speaking generally,

(Testimony of J. M. Thornton.)

about fifteen hundred or two thousand dollars were spent getting ready to do business in 1915, in advertising and going out and placing agencies, but that he had no way of determining as to how much was actually spent, as the books of the company did not show it; and in referring to a certain Six car, in answer to the question as to what he (Clark) said was the reason why the Six had not been sent, stated, "I guess they hadn't gotten any Sixes yet themselves," saying that Mr. Clark told him that the defendant company could not get them. He had had a conversation with [132] Mr. Vogler when that gentleman was in Seattle the last time, just preceding the cancellation of the contract, with reference to the financial condition of the company, and he told Vogler that the Harmon Motor Car Company stood well at the bank and could lift all the Reo cars it could get. That Sharpe & Leader succeeded the Harmon Motor Car Company in handling the Reos, and the following question was asked and answered as follows:

By Mr. IVEY.—(Q.) Now, you say that when you would 'phone Mr. Clark about these cars you would give him specifications. Then in answer to Mr. Halverstadt as to what kind of specifications you gave him you said that you told Mr. Clark "Send up all you can." Is that the only specification that you gave Mr. Clark?

A. Well, Mr. Clark spoke about—I asked Mr. Clark for Reo cars, and Mr. Clark said that there would be Fours. He also spoke about what he was shipping, what would be on the road, if any; and, in

(Testimony of J. M. Thornton.)

fact, he told me that he couldn't get Sixes; he told me he couldn't get Sixes.

He told Clark to send to Seattle all the Fours he possibly could, and that they were sent bill of lading with draft attached.

The witness admitted that the company was indebted to him in the sum of about \$1200.00 for services performed and commissions earned during the latter part of 1914, and that shortly after this contract was cancelled this indebtedness was reduced to judgment in his favor.

That there never was a time when the Northwest Auto Company did not have at least thirty days' notice to send all the cars they could, which was in compliance [133] with the schedule in the contract. That he reduced his claim to judgment against the Harmon Motor Car Company after the cancellation of the contract in suit, and because they went out of business. That from January, 1915, to February 22, 1915, he was acquainted, generally speaking, with the financial condition of the Harmon Motor Car Company, that it was good, and that it did not have any financial troubles during that time. [134]

### **Testimony of F. E. Harmon, for Plaintiff.**

F. E. HARMON, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALVERSTADT.)

Q. Your name is Frank E. Harmon?

A. Yes, sir.



(Testimony of F. E. Harmon.)

Q. What connection, if any, did you have with the Harmon Motor Car Company?

A. President of the company.

Q. Now, what was the name under which the company originally went?

A. McKenna-Harmon Company.

Q. What was it?      A. Incorporation.

Q. When did it begin business, approximately?

A. Along in October, 1912.

Q. Along in October, 1912. And was the business begun by it continued thereafter?

A. Yes, sir.

Q. To what time, if you know?

A. I don't quite get what you—

Q. To what date was the business of the company continued, if you know?

A. Of the McKenna-Harmon Company?

Q. Of the Harmon Motor Car Company on down?

A. Up till about the 1st of March, 1915.

Q. Now, will you explain to the jury how you came to go under the name of the Harmon Motor Car Company?

A. Well, after McKenna and I had been in business for a very [135] short time—McKenna was not an automobile man, and hadn't had any experience with the automobile business, had only been in it a little while, and he wanted to get out of it and we bought him out. After we bought him out there was no reason for continuing the name of McKenna-Harmon Company, although we let the name go along for several months after, or sometime anyhow, and I

(Testimony of F. E. Harmon.)

went down—then we concluded we would call the company the Harmon Motor Car Company. So I went down to our attorney and requested him to change the name from the McKenna-Harmon Company to the Harmon Motor Car Company. The articles were gotten out and papers signed, but for some reason or other he overlooked filing them.

Q. And did you or did you not suppose that the name had been changed in all the particularity required by the statute? A. Absolutely.

Q. And did the business of the McKenna-Harmon Company go on as before? A. Yes, sir.

Q. The only difference being one—

A. The change of some of the officers of the company and—

Q. I mean so far as name is concerned?

A. No, the name, we changed the name to the Harmon Motor Car Company.

Q. In other words, is this correct: The same business, the business was carried on just the same as it had before, except under a different name?

A. Yes.

Q. Mr. Harmon, in February, 1915, did the Harmon Motor Car Company maintain a place of business in the city of Seattle? [136] A. Yes, sir.

Q. Where was it located?

A. Corner of Boylston and Pike.

Q. In what city? A. Seattle.

Q. How long had it been in that location?

A. Since June, 1913.

Q. Since June, 1913, continuously?

(Testimony of F. E. Harmon.)

A. Yes, sir.

Q. How was that arranged with reference to show-room, work shop and so on, that building?

A. Well, it was built according to my own ideas—

Q. For this particular business?

A. For this particular business, yes. The building was constructed as such.

Q. Was it in an advantageous position or otherwise?

A. Well, it was not—it was then the best location in town, and it is yet one of the best for the automobile business.

Q. Was Pike Street one of the much traveled streets? A. Yes, sir.

Q. Calling your attention, Mr. Harmon, to this contract which is marked Plaintiff's Exhibit "3," I will ask you whether that is your signature at the bottom? A. Yes, sir.

Q. Now, by whom was this form prepared, this form of contract?

A. By the Northwest Auto Company.

Q. By the Northwest Auto Company?

A. Yes, sir.

Q. Did you have any suggestions to make in the preparation of that form of contract? [137]

A. Why, not—

Q. That is, in the form of the contract?

A. In the form, no.

Q. Did anyone on behalf of the Harmon Motor Car Company except you have anything to do with the signing of that contract?

(Testimony of F. E. Harmon.)

A. Not—I wouldn't say they had anything to do with it, no, not with the signing of it, no, but they understood what was going to be in it practically.

Q. In other words, you looked after the negotiation of the contract?     A. Yes.

Q. You dissevered your connection with that business about what time?

A. About the 2d of February, 1915.

Q. Now, up to that time, Mr. Harmon, if you know, how many cars—I mean subsequent to the date of the signing of the contract to which I have just called your attention, and up to the time you severed your connection with the Harmon Motor Car Company, how many cars, if you know, had the Harmon Motor Car Company sold, that is, new Reos?

A. On this—on the '15 contract?

Q. On the contract in suit.

A. Fifty-seven.

Q. Fifty-seven. Now, could you mention the names of the parties to whom those cars were sold?

A. Yes.

Q. Will you do so, slowly?

A. Burke Motor Car Company, twenty.

Q. How many? [138]

A. Twenty.

Q. All right.

A. Knutzen Bros., Skagit County, twenty.

Q. For Skagit County how many?

A. Twelve in Skagit and eight in Whatcom.

Q. Now who else?

A. Kent Motor Car Company, three.



(Testimony of F. E. Harmon.)

Q. All right.

A. Fred C. Poole, three.

Q. Poole was in what territory?

A. Clallam, I think.

Q. All right, go ahead.

A. There is one thing I must say, Mr. Halverstadt. You asked me up to the severing of my connection with that company?

Q. Yes, sir.

A. Now, there is several retail cars that were sold, that I know were sold, and saw the orders myself, and checks, and gave the checks myself back to the people, but it was after the cancellation—

Q. You know of your own knowledge that was done?

A. I know that was done, yes, sir.

Q. Go ahead and mention them. Who were the names of the parties to whom deposits were returned?

A. Cooley of Everett.

Q. That is attorney Cooley?

A. Yes, sir. And Mr. Wright in Seattle.

Q. And who else?

A. And Mr. Catts of Port Townsend.

Q. Now, then, were there any other parties to whom cars had been sold? [139]

A. Mr. McClellan in Seattle, Mr. Lysons, Mr. Cline.

Q. Some one spoke of— A. Mr. Vanlinda.

Q. On Vashon Island. Now, do you know anything about any negotiations having been carried on on behalf of the company for the establishment of

(Testimony of F. E. Harmon.)

an agency in Kittitas County?

A. Yes, with Mr. Nickerson.

Q. Had that been established at the time you severed your connection with the company?

A. No, it had not. I had been negotiating with him, and so had Mr. Thornton, and I know that Mr. Thornton made a trip to Ellensburg and made arrangements for the signing of the contract.

Q. Now, Mr. Harmon, if the Harmon Motor Car Company were unable to get delivery of cars and did not know when it could get delivery of cars, what effect, if any, would that have on the ability of the Harmon Motor Car Company to go out and establish other subagencies?

A. Well, naturally if you couldn't assure a man, or give a man a little idea, or very near the time of how soon he could get delivery it would be pretty hard for you to get an order. It would be more particularly so in retail sales than in wholesale sales.

Q. Well, why?

A. Because a dealer will figure he has got a certain season in which to sell, but if a retailer goes out and looks for a car he wants the car as soon as he makes up his mind which car he wants to buy.

Q. Do you remember how many cars were delivered by the [140] defendant in this case to the Harmon Motor Car Company? A. Nine.

Q. Do you recall about the date of the first delivery? A. October 19, 1914, one car.

Q. One car. What model? A. 1914.

Q. 1914 model? A. Yes, sir.

(Testimony of F. E. Harmon.)

Q. Now when, if you recall, was the next delivery?

A. January 29, 1915. That was four 1915 cars.

Q. That was four 1915 cars? A. Yes, sir.

Q. How were those four cars shipped with reference to payment?

A. Well, they were shipped the regular way, the way, I suppose, all the automobile dealers receive their cars.

Q. No, just how were those specific cars shipped with reference to draft or bill of lading?

A. Well, with sight draft attached to bill of lading.

Q. And how was that draft taken up?

A. Well, simply—how was that particular draft taken up?

Q. Yes.

A. Simply went down to the bank and gave them a check for the amount of the cars, for the amount of the draft, rather, and they immediately released a bill of lading to us, and we went down and got the cars.

Q. Was there any delay in taking that up?

A. Absolutely none.

Q. Was there any delay in taking up the one car which came in? A. None at all.

Q. Now, during what period of time, if any, was such an [141] arrangement between the Harmon Motor Car Company and the Northern Bank & Trust Company?

A. Well, you mean what arrangement?

Q. No. I say during what length of time was that arrangement between the Harmon Motor Car Com-

(Testimony of F. E. Harmon.)

pany and the Northern Bank & Trust Company in existence theretofore?

A. Why, it had been an arrangement for a year and a half or so, or more.

Q. Had you ever had any difficulty whatever in getting the bank to take up a draft for you if you didn't have money enough on hand when they come?

A. Never at all.

Q. At the time you left the Harmon Motor Car Company, severed your connection with it, had that arrangement been entered into for the coming season, the season of 1915?

A. I didn't quite catch that?

Q. Had you made such an arrangement with the bank at the time you left for the season of 1915?

A. Yes, I had that arrangement made—always had it—then in the regular way, and had the assurance of both the president and cashier of the bank there never would be any question in lifting Reo cars, and I can bring them up. I went down to the bank and explained to them if I could get cars during the month of December and January I would have to have considerable money to do that in order to have the cars, say, in March, April and May, when the selling season commences, I would have to have cars on hand to deliver them. I was assured by both the president and cashier they would lift every Reo car that came into this territory. [142]

Q. And never had any difficulty in having them doing it? A. No, sir, not at all.

Q. Now, Mr. Harmon, you were not with the com-



(Testimony of F. E. Harmon.)

pany when the last shipment came in spoken of here?

A. No, sir.

Q. Now let me ask you this question: What is the real automobile season, that is, the season in which cars can be sold; I mean at retail, not to subagents?

A. Well, March, April, May and June.

Q. Is that what you call the height of the season?

A. Yes, there is more cars sold then five to one than all the rest of the year put together.

Q. Just state why that is?

A. Well, it is only natural. The summer season is commencing, the winter is past, and the roads have gotten good, the driving conditions are at the best, the weather is at the best. It is only natural.

Q. When are the new models introduced on the market?

A. New models are generally introduced in the fall.

Q. Now, Mr. Harmon, what was the character of the 1915 Four and Six models of Reo cars as to character of construction, power, reliability and general desirability from the standpoint of the purchaser?

A. Well, the car was a very desirable car; it was a moderate price; small upkeep, and with all the latest modern equipment and improvements. The car gave elegant satisfaction and had a good reputation.

Q. How was it in respect to power?

A. The '15 had plenty of power.

Q. How with respect to ease in riding? [143]

A. Well, it was a very easy riding car. The 1915

(Testimony of F. E. Harmon.)

car was very much improved over our '14 car.

Q. Now, what did those cars, the two models, cost you at the factory?     A. List or our net cost?

Q. List.

A. Ten-fifty on the Fours and thirteen eighty-five on the Six.

Mr. IVEY.—Better get the catalogue, I think, if you want to testify to that.

Mr. HALVERSTADT.—Why, he can testify to what he paid and what they cost him.

Mr. IVEY.—Go ahead.

By Mr. HALVERSTADT.—(Q.) What did you say they cost?     A. Ten-fifty—not cost, but list.

Q. List, I mean.

A. Ten-fifty on the Four and thirteen eighty-five on the Six.

Q. Now, at what price did you sell those to people laid down in Seattle?

A. Eleven seventy-five on the Four and fifteen twenty-four on the Six.

Q. Mr. Harmon, what season was it, or when was it that the self-starter and the electric light was introduced in the automobile, what year?

A. Well, '14 was the year that nearly all of the cars came out with them. There was quite a few had them in '13, two had them in 1912, and '14 was the year they were really introduced.

Q. That is when they became general?

A. Yes.

Q. Now, what effect did the equipping of the car with a self-starter [144] have on the volume of

(Testimony of F. E. Harmon.)

sales that could be made of automobiles?

A. Well, the self-starter, with the many other improvements they put on, of course naturally increased the volume of sales to a very great extent.

Q. Why?

A. Well, because the cars were easier to handle. People before—if somebody was not very strong and weren't able to crank the car, why get them? Many of the women commenced driving. In fact, it is just like it is now, the women drivers become more and more prominent, and such things as that.

Q. How did the sale of automobiles generally during the year 1915 compare with sales of any previous year?

A. I believe statistics will show the sales are more than doubled.

Q. Why was that?

A. Well, one reason was the improvement of the cars and reduction in price.

Q. Were what?

A. The improvement in cars and reduction in price, along with the increased demand for cars.

Q. Any other factors that enter into that occur to you?

A. Well, I can't say. I think that—well, business people begin to find that cars can be used in their business to such a great extent. A business man will find it will enable him to get around quicker and make more money, because he can get around quicker, and such things as that.

Q. And at that time, during that season, did auto-

(Testimony of F. E. Harmon.)

mobiles [145] become sort of a business man's equipment? A. It did.

Q. Was that general or only—was that true generally or only in a very small degree?

A. Oh, that is true generally.

Q. That's true generally. What other model cars, what other cars were in competition with you in selling the Reo automobiles?

A. I didn't get that?

Q. What were the cars in competition with you in selling retail Reo automobiles?

Mr. IVEY.—I have never seen the materiality of that, your Honor.

The COURT.—I don't see the materiality.

Mr. HALVERSTADT.—All right.

Q. How did this car, the Reo car, compare with any other car, with a car of any other make, as to size, power, appearance or general desirability or reliability?

Mr. IVEY.—I object to that, too, your Honor, please.

Mr. HALVERSTADT.—Or salability.

Mr. IVEY.—We let a lot of that go in before; thought it was the easiest way out of it, but I don't see the materiality of it.

The COURT.—Sustained.

Mr. HALVERSTADT.—Exception, please. Your Honor, I am having Mr. Harmon make a calculation in writing which I will hand to counsel in the morning, and he hasn't quite completed it. Might we



(Testimony of F. E. Harmon.)

adjourn until to-morrow?

The COURT.—You may adjourn court until to-morrow morning.

Court adjourned until Friday morning. [146]

**Testimony of F. E. Harmon, for Plaintiff  
(Resumed).**

F. E. HARMON, a witness for the plaintiff, recalled for continued examination, further testified as follows:

Direct Examination (Resumed).

(By Mr. HALVERSTADT.)

Q. Mr. Harmon, what, if anything, in addition to what you testified yesterday—what condition, if any, in addition to what you suggested yesterday afternoon, created a demand, an especial demand for automobiles in the city of Seattle in the year, latter part of the year 1914 and 1915?

Mr. IVEY.—Object to that, your Honor, please, as being immaterial.

The COURT.—I don't know that I got the full force of the question. (Question repeated.)

Mr. IVEY.—I contend, your Honor, please, that doesn't prove any particular transaction could have taken place, even though the witness, would say the demand was great at that time. I don't believe it even has a tendency to prove that. I think it is speculative and, therefore, it is immaterial. I mean it is immaterial because it doesn't tend to prove the plaintiff's rights to damages. [147]

(Argument.)

(Testimony of F. E. Harmon.)

The COURT.—I think the question may be answered.

Mr. IVEY.—Exception.

Mr. HALVERSTADT.—Read the question, please.

Q. (Question repeated.)

A. Well, along with the other things I named yesterday, one thing in particular was the coming of the jitney bus. That is a thing there that brought out several hundred sales, a good many hundred sales, in the city of Seattle alone; and the Reo car was a practical car for that because of its features of being cheap in operation, and such things as that, and there were a good many Reos and such cars as that sold.

Mr. IVEY.—I move, your Honor, to strike that out for this reason: Counsel's general statement—because he starts off with the hypothesis that under a contract of this kind the plaintiff is entitled to recover prospective damages. That is where his fallacy is, I think. Now what, your Honor, has the jitney business to do with this contract that the defendant had with the Harmon Motor Car Company? Does that prove that one of those jitney drivers would come down and buy a car from the Harmon Motor Car Company, or if they did buy it they would pay for it? Has it any bearing on it at all? I say not. And it is just that kind of testimony that I have been objecting to right along. Now, I make this motion to strike and to submit it again to your Honor for ruling.

(Testimony of F. E. Harmon.)

Mr. HALVERSTADT.—I will follow this testimony further with the testimony that this particular make, brand new, was put in that service; or at least I understand that is the [148] fact.

Mr. IVEY.—Well, suppose it was, if your Honor please, suppose there was half a dozen jitney fellows drove those around. We may have notice they are being driven up and down the street; but what has that got to do with our contract?

(Argument.)

The COURT.—I can see how this testimony might be material for consideration, and I think the motion must be denied.

Mr. IVEY.—Like an exception.

The COURT.—It may be the Court will be required to limit the consideration of this testimony in the instructions, but the motion must be denied.

By Mr. HALVERSTADT.—(Q.) Now, Mr. Harmon, the term “jitney” is a new one and I don’t know whether it has any established legal meaning. For the purpose of the record state what is meant by the term “jitney.”

A. Why, it is—it’s an automobile.

Q. What is a jitney bus as the term is used?

A. It is an automobile that is used to carry passengers for the same fares and running them on practically the same streets as the street cars, and for the same fares that the street cars charge; in other words, five cents, most of them; on others, of course, they charge ten.

Q. I see. Now, Mr. Harmon, do you know of any

(Testimony of F. E. Harmon.)

new Reo cars, such as are mentioned in the contract in suit here, being sold for and used in the jitney bus service?     A. Yes, sir.

Q. Prior to July 31, 1915?     A. Yes, sir.

Mr. IVEY.—My objection goes to that also, your Honor, please. [149]

The COURT.—Sustained.

Mr. HALVERSTADT.—May I ask your Honor was it because of the form of the question that the ruling was made?

The COURT.—No. I think the mere fact that this character of car may have been used in that sort of service, why, it would not, if it is, aid us here.

Mr. HALVERSTADT.—Note an exception. That question may not have been finished, and merely to save the ruling I will add to it, “in the territory covered by this contract in suit,” which I assume will not change the Court’s ruling.

The COURT.—No.

Mr. HALVERSTADT.—Exception.

Q. Mr. Harmon, these subagents who were employed, or to whom contracts had been sold by the Harmon Motor Car Company, were they responsible financially?

A. Yes, they were. Any one of them have a—

Q. All of them?     A. All of them.

Mr. IVEY.—I object to that, your Honor, as stating a conclusion, and move to strike the answer out. Responsible financially doesn’t mean anything; it is



(Testimony of F. E. Harmon.)

a conclusion. He can ask him how much those people had, if he knows.

The COURT.—I think the objection must be sustained and the answer must be stricken.

Mr. HALVERSTADT.—Exception. Let me put it this way, possibly this will not be objectionable.

Q. What was the reputation of these agents for discharging their obligations?

Mr. IVEY.—I object to that, your Honor, please, for the reason that would be another conclusion that he will state. [150] He may state, if he wants to, what these agents owned and what they had done theretofore, something of that kind which are facts, but this man's reputation I think would be immaterial. His reputation might be one thing with one man and one thing with another.

The COURT.—The objection must be sustained. The witness hasn't shown he has any knowledge that would enable him to testify to that.

Mr. HALVERSTADT.—Exception.

Q. Mr. Harmon, had the Harmon Motor Car Company had any of these agents during any preceding season as subagents?

A. Had two of them, yes, three.

Q. Which three?

A. Kent Motor Car, Poole and Burke.

Q. During that season did they comply with their contracts? A. Yes, sir.

Q. Any trouble with them at all?

A. Absolutely none whatever.

Q. Now answer this question yes or no, and wait

(Testimony of F. E. Harmon.)

till an objection is made, if one is made: Do you know, Mr. Harmon, what was the financial worth, or approximate financial worth, of Knutzen Bros., one of the agents mentioned here? Answer it yes or no, if it can be answered yes or no.

A. I can answer what their rating was.

Q. Well, what was their financial rating?

A. Seventy-five thousand—

Mr. IVEY.—Object to that, your Honor, as not being material.

The COURT.—Sustained.

By Mr. HALVERSTADT.—(Q.) By whom was this rating made? [151]

A. Bradstreet.

Q. Now, what is Bradstreet's?

A. A mercantile agency that looks up the standing of different business firms, or anybody in particular.

Q. How general is the use of Bradstreets's Mercantile Agency for the purpose of determining a man's solvency or otherwise and the extent of credit to which he is entitled?

A. Well, it is used by nearly all the business firms.

Q. In what part of the country?

A. Everywhere.

Q. Is it a standard guide everywhere?

A. Yes, sir.

Q. Now, I will ask you whether it is or is not used in the commercial world generally in the United States? A. Yes, it is.

Q. Now, I will ask you what was the rating given

(Testimony of F. E. Harmon.)

Knutzen Bros. in Bradstreet's, by Bradstreet's during the period when this contract was in force and effect?

Mr. IVEY.—I object to that, your Honor, please, The witness hasn't stated that he knows in the first place.

Mr. HALVERSTADT.—He said he did know.

Mr. IVEY.—No, I mean he didn't say he knew what the rating was during this period.

Mr. HALVERSTADT.—I will withdraw that question and put this:

Q. Do you know, Mr. Harmon,—answer yes or no—what rating Bradstreet's gave to Knutsen Bros. during the term of the contract in suit here?

A. Yes, sir.

Q. Now, what was that rating?

Mr. IVEY.—I object now, your Honor, please, on the ground [152] that it proves nothing and it is immaterial.

(Argument.)

Mr. HALVERSTADT.—I will withdraw that question temporarily and put this one:

Q. For how long a period of time to your knowledge has Bradstreet's report been so used by the commercial world? A. It is past my memory.

Q. Just what do you mean by that?

A. Well, I mean I can't remember back how far. Ever since that I can remember I can remember of Bradstreet & Dunn.

Mr. HALVERSTADT.—Now I will renew the former question.

(Testimony of F. E. Harmon.)

The COURT.—This is the way it impresses me. Bradstreet's report or rating is made, of course, from reports of their various representatives. It is a conclusion based upon a report made by its representative at the particular place where these parties are located. So far as the report is concerned as against the defendants in this case it would be clearly hearsay, because it would deprive the defendants of a cross-examination upon statements or conclusions made by this representative, and, therefore, would deny them the right which the law accords them. And the same conclusion must follow if you consider the general reputation in the light of a general reputation in the community where these people do business, because it is based upon a conclusion of a party who, so far as the proceeding in this court is concerned, has not shown he is acquainted with that general reputation, and the defendant would be deprived of the same right on cross-examination to find out if his conclusion is based upon the right premises. Standing alone, without any evidence of the assets possessed by these [153] parties, I don't think that the Court should receive it. A court might consider, or permit the jury to consider, such a report after it had been established that these parties did own property, or have actual assets that were not encumbered, and assets in excess of liabilities. The objection must be sustained.

Mr. HALVERSTADT.—Exception.

The COURT.—Yes. And I will state now that I feel, and the conclusion is not simply a conclusion of



(Testimony of F. E. Harmon.)

the moment, but I am impressed in this conclusion by some investigation I made of this sort of subject some years ago when I was retained as an assistant to a public prosecutor in prosecuting some bank officials who had been arrested, and it became necessary to establish the financial standing and status of the bank.

Mr. HALVERSTADT.—I will simply say, your Honor, the case we were relying on—the Supreme Court of this State, of course, is not binding on this court—but just lately decided where that identical question arose.

The COURT.—I will be very glad to see that case. You may present this matter again.

By Mr. HALVERSTADT.—(Q.) Mr. Harmon, up until the time you severed your connection with the Harmon Motor Car Company, and during the time that Mr. Thornton had an account on the books coming to him, state what that account included, how it was made up, what items entered into it?

A. Well, in the first place, his salary—he drew a salary—and then the commissions on every car that he had sold.

Q. Now, did that account vary? A. Yes. [154]

Q. Dependent on what?

A. Dependent on the amount of sales that he had made and on how much money he had drawn.

Q. Was or was he not permitted to draw whatever amount he pleased whenever he chose?

A. Yes, he was.

Q. Did he ever at any time express to you any de-

(Testimony of F. E. Harmon.)

sire to have all of it?     A. Never had.

Mr. IVEY.—I object to that, your Honor, please; that is hearsay. No agent of ours present.

The COURT.—Let the answer stand.

By Mr. HALVERSTADT.—(Q.) Was there at any time any demand on his part for any part or all of that account which was not complied with?

Mr. IVEY.—Object to it, your Honor, please, unless it is in writing.

The COURT.—Let him answer.

Mr. HALVERSTADT.—Read the question, please.

Q. (Question repeated.)

A. No, sir.

Q. You are speaking now, of course, during the period that you were connected with the concern?

A. That I was connected, yes, sure.

Q. One thing that was called to my attention last night, Mr. Harmon, that is to the effect that you answered the question of how many cars had been actually sold by the Harmon Motor Car Company up to the time you left, and that the number was fifty-seven. Was or was not that answer made before? [155]

A. Yes, that was the answer I made.

Q. Well, is that correct?

A. That is correct if you would include four cars—there was fifty-three actually sold, but there was four cars that were practically sold; that is, Thornton had gone to Ellensburg and made arrangements for the selling of them, all the details and everything, but for some reason or other he didn't get the thing signed

(Testimony of F. E. Harmon.)

at that particular time and had to lay over a few days. Within two weeks, or three weeks, something like that,—oh, we will say within thirty days, he went over for the company that succeeded the Harmon Motor Car Company in handling the Reo and signed up identically the same contract for them that he would have for the Harmon Motor Car Company.

Mr. IVEY.—I move to strike that out unless the witness produces the contract that he says was signed up.

Mr. HALVERSTADT.—All right, produce the contract; you have it, the one for Ellensburg.

Mr. IVEY.—Have we got that?

Mr. HALVERSTADT.—Yes, sir. If you give it to us we will introduce it.

Mr. IVEY.—We don't seem to have it. Are we supposed to have it?

Mr. HALVERSTADT.—Why, certainly. Will you please let this go till noon?

Mr. IVEY.—Yes.

Mr. HALVERSTADT.—Thank you.

Mr. IVEY.—Who did the witness say signed that particular contract?

By Mr. HALVERSTADT.—(Q.) What was the name of the party over [156] there making that contract? A. Nicholson Auto Company.

Mr. IVEY.—When was it supposed to have been signed?

Mr. HALVERSTADT.—Just very shortly—in the early part of March some time, March, 1915, or maybe in the latter part of March.

(Testimony of F. E. Harmon.)

The WITNESS.—March—along in the latter part of March or first of April.

By Mr. IVEY.—(Q.) Who was the seller in that contract?

A. Puget Sound Motor Car Company.

By Mr. IVEY.—(Q.) You mean that was Sharpe & Leader? A. Sharpe & Leader, yes.

By Mr. HALVERSTADT.—(Q.) Mr. Harmon, I call your attention to an instrument marked Plaintiff's Exhibit "13," consisting of two sheets, and I will ask you to state very briefly just what it is; not its contents, but what it is.

A. Well, one sheet shows the profits that could have been made on cars that I—

Mr. IVEY.—Move to strike that out, your Honor.

A. (Continuing.)—that should have been paid.

The COURT.—Let's find out what it is. Proceed.

A. (Continuing.) Well, one shows a profit that should have been paid—

By Mr. HALVERSTADT.—(Q.) By whom to whom?

A. Well, it is a difference of what the cars would have sold for selling to agents and retail sales, the difference between what the Harmon Motor Car Company would have paid and what they would have gotten for the cars. The second—in another instance it shows what profits could have been made on cars if they had been delivered and the contract [157] continued by the Northwest Auto Company.

Q. Proceed if it shows anything else.

A. It also shows the gross profits of this and the



(Testimony of F. E. Harmon.)

net expense of selling these cars, and it shows the total amount of profits. And in the second sheet it shows an itemized list of what the overhead would have been and what that expense would have been to have sold those cars, and is based on what the expense was, approximately the expense was the previous year, including commissions and all the general overhead and everything.

Q. Did you make this statement?

A. I assisted.

Q. From what data were these figures secured? In other words, explain to the Court and jury what basis you used for these figures? A. We used—

Q. Now take, for instance, first the number of cars which had been actually sold at the time this contract was cancelled. What basis of computation did you use there?

A. Well, we took, in the first place, what the cars would cost us—

Q. Meaning Harmon Motor Car Company?

A. Cost the Harmon Motor Car Company, yes. Then we took what we would have gotten for the cars when they were delivered.

Q. Exactly. Now, then, as to cars which had not been sold at the time this contract was cancelled, how did you treat those; what was your basis of computation to get the gross profit?

A. The same way. We would take what the cars would have cost us and what we would have sold them for. [158]

Q. And what you would have sold them for. Now,

(Testimony of F. E. Harmon.)

then, in the expense which you mentioned as overhead expense in selling these cars, what items did you include? I don't mean each definite item, but expense for what, or doing what?

A. Include our general overhead.

Q. By that you mean what?

A. Rent, light, telephone, and all such as that.

Q. All right.

A. And shop salaries, and office salaries, and salesmen's commissions, and so on and so forth, everything that would be necessary to sell that many cars.

Q. Exactly. And what did you include in the item of profits on your shop and so on; what was the basis of computing that?

A. I, of course, figured a loss of a certain amount, and, in a way, I would figure profit—if you were paying a man so much a month, after you had figured so much for upkeep of cars, and such as that, if you were keeping a shop force of two or three men and paying them, say, thirty-five or forty cents an hour and getting seventy cents an hour for the time, you would have to figure a certain profit. If we buy a certain article, such as parts or accessories, if we bought them for seventy-five cents and sold them for a dollar there would be a profit. I figured approximately what our net profits would be, based on what they were the year previous, not even figuring for the increase.

Q. Now, on this sheet there is an item marked as "Deposit on contract." What is that?

A. That is \$750.00 deposit on—

(Testimony of F. E. Harmon.)

Mr. IVEY.—I object to the details of that matter being discussed [159] any further, if the Court please.

Mr. HALVERSTADT.—That is well taken. I will withdraw that question. I did it inadvertently. Now, I offer the statement in evidence.

Mr. IVEY.—I object to it, your Honor, please, as being wholly immaterial, irrelevant and incompetent. The witness testifies that he made up this statement from the assumption that he was going to make certain profits, and certain things were going to happen, and certain cars were going to be sold, and a lot of other assumptions. We don't know whether any of those things would have happened or not. I don't know what this sheet shows (indicating.) It probably shows that thirteen thousand dollars. I was trying to find out something about what it was and I was headed off, but I can take right now, if your Honor please, a catalogue and I can talk to Mr. Vogler here—

Mr. HALVERSTADT.—I will withdraw the offer temporarily.

Q. Can you state from memory all the figures which would be necessary to show the profit that you would have made on each of these cars had the orders been sold? A. No, sir; not from memory.

Q. I will ask you whether this Exhibit "13," Plaintiff's Exhibit "13," is one which you have prepared for the purpose of testifying to those matters?

A. No, it is not. It is what we have figured out is

(Testimony of F. E. Harmon.)

the absolute facts in the case.

Q. Then it does show the facts in the case?

A. Yes.

Q. Now, then, there is in evidence here a contract of sale of three cars to the Kent Motor Car Company. Now, what [160] would those three cars each have cost the Harmon Motor Car Company?

Mr. IVEY.—Object to that now, if your Honor please, if this witness is testifying from the statement they are trying to introduce. He can testify, if he wants to, as to how much he was paying us for those cars, then he can testify, if counsel wants him to, as to what the purchaser from him was to pay him.

Mr. HALVERSTADT.—All right.

Mr. IVEY.—Unless that is an oral contract.

Mr. HALVERSTADT.—All right.

Mr. IVEY.—If you have got your written contract of record I believe that proves everything the witness could possibly testify to.

Mr. HALVERSTADT.—Here is the situation, your Honor. This will involve a considerable number of items of an account. I defy any twelve men to sit in the jury-box and carry all these figures in their head and get anywhere within five hundred thousand dollars of the result; it can't be done. Now we have a right to put this down in black and white for the purpose of aiding them in determining the fact.

Mr. IVEY,—No objection to putting facts down in black and white, but this is a speculation. Mr. Vogler could tell me right now I could make five hundred dollars on a certain Lozier car, for instance,



(Testimony of F. E. Harmon.)

and I could figure out here in a few minutes how I could be a millionaire in a year. I could just figure that thing out like this thing has been figured out there and see myself a millionaire right away. They say you can rent an old barn down here at ten dollars a month, and so forth, and that is the [161] thing we are confronted with here.

Mr. HALVERSTADT.—All right. Now, the Court will bear in mind I am asking now as to a definite contract of sale.

The COURT.—He may answer the question.

Mr. HALVERSTADT.—Read the question, please.

Q. (Question repeated.)

Mr. IVEY.—I will ask the witness this question: Isn't the cost of those automobiles now you are speaking of stated in this contract?

A. Not the net cost, just what the discount would be.

Mr. IVEY.—(Q.) Are you talking about the contract now you had with your subagent? A. Yes.

Mr. IVEY.—All of them are the same, I suppose?

Mr. HALVERSTADT.—Except probably as to rates of commission.

The COURT.—Proceed.

By Mr. HALVERSTADT.—(Q.) Now, then, what amount of money would the Kent Motor Car Company, in dollars and cents, have paid you for those three cars, paid the Harmon Motor Car Company?

(Testimony of F. E. Harmon.)

Mr. IVEY.—I object to that, your Honor please. The contract speaks for itself if there is a contract.

The COURT.—If these matters are all in the contract, and the contracts are in evidence, the jurors can compute that. I understood the matter is in the contract, but not in concrete form as you have it there. It is simply a matter of computation. This isn't a matter where large items of book accounts are involved that requires an abstract and digest of the whole matter; it is purely a computation right from the contract itself. [162]

Mr. HALVERSTADT.—Exception.

Q. Mr. Harmon, what items entered into the net price of the cars to the subagents of the Harmon Motor Car Company? A. What items?

Q. Yes. Not in dollars and cents, but what items?

A. Well, there would be just the car and the freight.

Q. Now, was or was not the freight the same in all cases? A. No, it wasn't.

Q. All right. Now, in the case of the Kent Motor Company what was the freight which had to be added to the net price of the car to the Kent Motor Car Company? A. \$110.00.

Q. In the case of Knutzen Bros. what was the freight? A. Hundred and ten.

Q. In the case of Fred C. Poole what was the freight? A. Hundred and ten.

Q. In the case of Burke Motor Car Company of Everett what was the freight?

A. That was a hundred and five.

(Testimony of F. E. Harmon.)

Q. In the case of the sales to H. D. Cooley of Everett, to W. E. Wright and to W. H. Catts, what amount of freight would each of those pay?

A. \$125.00.

Q. Now, then, I think it is in evidence as to the retail sale price of these cars, is it not? You did testify to that, or did you not? A. Yes.

Q. Now, Mr. Harmon, did or did not the company make any profit, the Harmon Motor Car Company make any profit in the way of freight on the cars which it sold? [163]

Mr. IVEY.—Well, I object to that, your Honor, please. I don't see what that has to do with us.

Mr. HALVERSTADT.—It shows what was coming to it.

Mr. IVEY.—How would that profit on the freight affect us in any way? You mean to say they get a rebate or something? I don't quite see what you are getting at. Unless some foundation is laid for that I don't think it is material.

The COURT.—Yes, I don't understand the theory.

By Mr. HALVERSTADT.—(Q.) Mr. Harmon, tell me whether or not the Northwest Auto Company did anything in the way of fixing the amount of freight which should be charged by its agents to the agents of the Harmon Motor Car Company?

Mr. IVEY.—I don't quite see that yet either.

The COURT.—He may answer.

A. They didn't make it absolutely definite that you had to charge a certain amount. They couldn't. There was nothing provided anywhere in any con-

(Testimony of F. E. Harmon.)

tract for anything like that. But we generally tried to agree, at least Wing Brothers and ourselves—Wing Brothers are in Tacoma—to agree on the same price, and this last year we thought of trying to get together and establish a price of, I believe, fifteen twenty-five on Sixes and eleven seventy-five on Fours. The Northwest Auto Company, getting a larger amount, of course, than we, could afford sometimes to save freight a little more than we could.

By Mr. HALVERSTADT.—(Q.) And was that done with the knowledge and consent of the Northwest Auto Company, the defendant, that is, fixing of a definite freight rate? A. Oh, yes.

Q. Now then, Mr. Harmon, what amount of freight, what would [164] be the freight on one car to the Harmon Motor Car Company?

A. Around about \$95.00.

Q. Now, what amount of freight would the Harmon Motor Car Company charge a purchaser at retail on one of those cars?

A. Hundred and twenty-five.

Q. Hundred and twenty-five? A. Yes, sir.

Q. Well then, what amount of freight would they charge their subagents, the figures that you have mentioned heretofore? A. Yes.

Q. That is a hundred and ten dollars in all cases except Burke, a hundred and five? A. Yes, sir.

Q. Now, see if I have it right. There were then three figures for freight; \$105.00 to Burke Motor Car Company in Everett on each car? A. Yes.

Q. \$110.00 on each car to Knutzen Bros., Poole, Kent Motor Car Company and any other subagent?



(Testimony of F. E. Harmon.)

A. Yes.

Q. And to purchasers at retail of cars there was \$125.00 freight?     A. Yes, sir.

Q. Now, that freight was added in the case of a retail purchaser to what—

A. I made a mistake. \$130.00 freight.

Q. A hundred and thirty?

A. Hundred and thirty, yes.

Q. That freight was added, in the case of a retail purchaser, to what figure? [165]

A. You mean on to the list price of the car? I didn't quite get the question.

Q. For instance, you testified that the cars at retail sold for eleven seventy-five, that is, to a retail purchaser?

A. No, I told you it would a hundred and twenty-five added on. I was thinking of thirty dollars profit. Hundred and twenty-five added on to the retail, yes.

Q. Did this figure of eleven seventy-five for Fours include the freight?     A. Yes, sir.

Q. Mr. Harmon, can you testify from memory to exactly the different items of expense which would have been incurred by the company in selling these cars had the contract been continued?

A. Why, that would be pretty hard. There is some items that I would probably overlook; but the most important ones of course I would remember.

Q. Would it be possible for you to do so, do you think?

A. The most important ones, anyhow, yes.

(Testimony of F. E. Harmon.)

Q. Well, now, did you have a rent to pay up there?

A. Yes.

Q. What was that rent per month?

A. It was \$225.00.

Q. Mr. Thornton, I believe, was in your employ?

A. Yes, sir.

Q. What was his salary per month?

A. Hundred and fifty.

Q. Who did you have in the shop? Was there a man there by the name of Ed?

A. Yes, there was different men in the shop at different [166] times. The last man that was in the shop was—

Q. How much did he draw?

A. Eighty dollars a month.

Q. Did you have another employee by the name of— A. Yes.

Q. What was his duty?

A. Well, he washed cars. He was really a porter and washed the cars, washed the demonstrator and outside cars and such as that.

Q. What salary did he get?

A. Why, he got sixty dollars.

Q. Did you have another employee by the name of—

A. Yes.

Q. What was his duty? A. He is a mechanic.

Q. What salary did he get? A. Sixty.

Q. Did you have a man in your employ by the name of Lynch? A. Yes.

(Testimony of F. E. Harmon.)

Q. What was his duty?

A. He looked after the stock and worked in the office and such things as that, you know.

Q. What salary did he draw?     A. Sixty-five.

Q. Did you have a light bill up there, the monthly light bill?     A. Yes.

Q. Do you recall what that was a month?

A. Oh, that would vary from, say, ten to twenty dollars a month. I would strike an average around about fifteen dollars. [167]

Q. Did you have a telephone in the place?

A. Yes.

Q. What was your monthly rate?     A. \$9.50.

Q. Did you have any towels or toilet supply up there?     A. Yes.

Q. What was the cost of that per month?

A. One dollar per month.

Q. Have any long-distance telephone calls?

A. We used to have considerable long distance telephone calls, but some of them were in this way: If a customer came in and wanted parts, and wanted them immediately, and didn't have them on hand, and wanted us to get them right away, we would long distance to Portland, and we used to run our bill up considerable, but we in turn charged it to the man who wanted the parts, so there was no loss on that.

Q. Were there any long distance telephone calls the company had to charge to itself?

A. Oh, around about five dollars a month, something like that.

(Testimony of F. E. Harmon.)

Q. Were there any telegrams the company had to send out which were chargeable to the company?

A. I suppose so.

Q. About what would they run per month?

A. Well, they would vary.

Q. What would be a fair average?

A. You might say five on that.

Q. Was it necessary to carry any insurance?

A. Yes.

Q. About what would that run a month?

A. Oh, I should judge—let me see—about thirty-five, [168] something like that.

Q. From the 22d of February on to the 31st of July would the company, in the ordinary prosecution of its business, have done any advertising?

A. Why, yes.

Q. About what amount per month would you say would have been necessary?

Mr. IVEY.—I object to that, your Honor please, as incompetent, and immaterial.

The COURT.—Let him answer.

By Mr. HALVERSTADT.—(Q.) About what amount would you say, Mr. Harmon?

A. About fifty dollars a month.

Q. Would the Harmon Motor Car Company have been under any necessary expense in the way of demonstration during this period? A. Oh, yes.

Q. About what would be a fair average monthly cost of that expense?

A. Oh, I should judge about a dollar a day, something like that.



(Testimony of F. E. Harmon.)

Q. Dollar a day, thirty dollars a month. Now, then, you recall anything else that would enter into expenses along the line that I have been mentioning here aside from salesmen, actual salesmen's commission?

A. Well, there possibly would be, maybe, some little things. Wouldn't be anything to any great extent.

Q. Now, what per cent was Mr. Thornton working under, what rate?

A. Three per cent. [169]

Q. Three per cent on what, on both models?

A. Of the net—I mean of the list price of the car f. o. b. factory.

Q. Now, did you have any other salesmen at the time you left, and would other salesmen have been necessary during the balance of the season aside from Mr. Thornton? A. Yes, probably one.

Q. How many? A. One.

Q. Probably one. What commission, if you know, was he getting? A. Well, we paid five per cent.

Q. Now, do you recall any other expenses which would have been necessary or incidental to the selling of these cars had the contract been continued?

A. You are speaking of the—

Q. That is, of the expense of selling these other cars, the forty-three cars which were still left?

A. There would have been very little expense, except there would have been a little service on them.

Q. What would you say would be a fair cost for service?

(Testimony of F. E. Harmon.)

A. Probably a hundred dollars a month, is probably what our service man would cost us and his assistant.

Q. Now, can you think of anything else which would go in that same category?

A. No, I can't say as I do.

Q. All right. Now then, get in the class of receipts. Was the company selling any parts, and did it have any parts on hand for sale?

A. We had a very large stock of Interstate parts we used to sell quite a considerable of. [170]

Q. A demand for them? A. Yes.

Q. What was the fair monthly average profit to the company, if any, on the sale of parts?

Mr. IVEY.—I don't believe that has anything to do with those contracts.

The COURT.—I don't see the theory, Mr. Halverstadt, of the inquiry.

Mr. HALVERSTADT.—(Q.) Let me ask you this, Mr. Harmon: Did or did not the sale of parts reduce the overhead expense in selling these cars?

A. Why, yes.

Mr. IVEY.—Object to that question, your Honor. That doesn't have anything to do with it.

Mr. HALVERSTADT.—I will put this question, which will probably remove the objection:

Q. Would it have been possible for the Harmon Motor Car Company, as it was then situated in its premises, to continue the sale of parts without the sale of cars at any profit?

Mr. IVEY.—Object to that, your Honor, because

(Testimony of F. E. Harmon.)

if it wasn't possible it was no fault of ours.

The COURT.—Sustained.

By Mr. HALVERSTADT.—(Q.) Mr. Harmon, can you tell us approximately what would be the cost of selling these cars, the net cost to the company, of selling these cars during the period from March 1st, 1915, from the expiration of the contract, to July 31, 1915?

Mr. IVEY.—Object to that, your Honor. If he can testify what was the cost of selling other cars he may do so. [171]

Mr. HALVERSTADT.—Now, it seems to me counsel is in an inconsistent position. He takes the position, as I understand, that we may not show to the jury the different items which reduces the gross overhead cost of selling these cars, and at the same time takes a position that we can't show the net overhead expense which would have occurred in selling these cars. That, as I conceive, is the force of his objections.

Mr. IVEY.—No, you misunderstand me, I think, Mr. Halverstadt. I object to the witness testifying what would have been the cost. He can testify as to what was the cost of something else, if that is material, but what would have been the cost here he doesn't know.

Mr. HALVERSTADT.—All right.

Q. Mr. Harmon, basing your answer on what you had theretofore learned and what you then knew at the time you left the company of the cost to the company in selling forty-three cars under conditions as

(Testimony of F. E. Harmon.)

they existed from the 22d of February, 1915, to the 31st of July, 1915, what, in your opinion, would have been the cost to the company of selling forty-three Reo automobiles of the 1915 model at retail?

Mr. IVEY.—My objection goes to that, of course, your Honor, for the same reason stated a few minutes ago. He is now testifying what would have been the cost of selling some machines.

The COURT.—He may answer what was the expense of selling a car under the circumstances.

Mr. IVEY.—I thought that is what he went over these figures a few minutes ago for, to give us some facts from which [172] we could deduce the cost. I think, your Honor, that just the statement that it cost \$25.00, or \$30.00, or something like that, to sell a car is a conclusion; it would seem to me to be. I think that would strike a business man as a conclusion, because a man would want to know what they mean by \$25.00 to sell the car. If he was a business man at all he would ask, Well, how do you figure that? It might cost one man \$25.00 and cost another man \$150.00

The COURT.—He may answer.

Mr. IVEY.—Note an exception.

Mr. HALVERSTADT.—Read the question, please.

Q. (Question repeated.)

The COURT.—Not what is your opinion, but what was the cost?

Mr. HALVERSTADT.—All right.

Mr. IVEY.—I think, your Honor please, Mr. Hal-



(Testimony of F. E. Harmon.)

verstadt and your Honor, too, might all misunderstand one another. I am objecting to the witness testifying as to what something would have cost that hasn't yet taken place.

The COURT.—I understand.

Mr. IVEY.—All right. Note an exception.

By Mr. HALVERSTADT.—(Q.) What would have been the cost?

A. Oh, I should judge around—that's pretty hard to answer now. Be around, I should judge—I must admit I am not stating from memory or anything like that, I am stating basing my figures on previous results and what we had done previously. Be around about—

Q. Now, Mr. Harmon, I will call your attention to one of the sheets of this Plaintiff's Exhibit "13," and I will ask you whether you can take that memorandum and from it tell just what this cost would have been? [173]

Mr. IVEY.—I will object to that for the same reason I have objected before to the witness referring to this memorandum which is made up for this purpose. He is a professional, your Honor, and been in this business for ten or twelve years, testified he could tell how much it would have cost to sell them.

The COURT.—If he knows he can tell. If he can look at that paper and have his memory refreshed so as to be able to testify from memory he may do it.

By Mr. HALVERSTADT.—(Q.) Mr. Harmon, looking at the sheet which you have in your hands can you, by referring to that sheet, refresh your

(Testimony of F. E. Harmon.)

recollection so you could state to this jury the cost which we have been speaking of? Answer yes or no.

A. Yes.

Q. So referring to it refresh your recollection and state what would be the cost to the company of selling forty-three automobiles during the period between February 22, 1915, and July 31, 1915, on conditions as they then existed?

Mr. IVEY.—Your Honor please, in order that we may all understand one another I object to the witness answering that question for several reasons. The first is that no proper foundation has been laid for the witness using this document, and none can be laid so far as the record shows. And secondly, when he takes this document with a great number of figures on it and makes a statement that from his examination of this document, because that is what it amounts to, he concludes that it would cost the Harmon Motor Car Company a certain number of dollars [174] to sell forty-three machines, I say to your Honor that testimony would be an absolute conclusion, it would be incompetent, no foundation laid for it, and it would be very improper.

The COURT.—There is no use to argue. I have already stated he can't take that paper and read from it, but he can look at it and have the original transaction come back to his mind so he can testify from memory. You can look at it and have your memory refreshed so you can testify from it, but you can't read from it.

By Mr. HALVERSTADT.—(Q.) Can you answer

(Testimony of F. E. Harmon.)

under the instructions the Court gave you?

A. Yes.

Q. After looking over that statement (Plaintiff's Exhibit "13") does it refresh your recollection so that you recall distinctly the amount of that cost?

A. Yes.

Q. All right, sir, state the amount of the cost.

A. Around about sixty-one hundred dollars.

Q. Now then, at the same time this cost was being incurred by the company was there anything which the company could do only if it had these cars to sell which would reduce this cost?

Mr. IVEY.—I object to that, your Honor please, as calling for a conclusion and being immaterial. I can't follow this. We have a contract here, and it seems to me we should introduce evidence in regard to something in that contract.

The COURT.—Objection sustained. He testified to what the cost would be, and now he is asked what could be done to reduce the cost. That is entirely speculative. [175]

By Mr. HALVERSTADT.—(Q.) What had the company been in the habit of doing during the entire time it was in business, and which it was then carrying on, which did, in fact, reduce the cost of selling automobiles?

Mr. IVEY.—Well, that is a double question. Your Honor sees there is two questions in one.

Mr. HALVERSTADT.—I will withdraw that and put it this way, then:

Q. During the time the Harmon Motor Car Com-

(Testimony of F. E. Harmon.)

pany had been in business did it do anything which did, in fact, reduce the cost that you have mentioned here to the company?

Mr. IVEY.—I object to that question being answered for the reason that would have no bearing on this company so far as I can see.

The COURT.—The objection is sustained. He was asked to state a moment ago what was the cost to the company in the sale of these several cars, or other cars under the same circumstances. He stated. Now then, he is asked to state what the company could have done to reduce the cost. Now that isn't consistent with the other answer. That is supposed to be included in the other answer.

By Mr. HALVERSTADT.—(Q.) Mr. Harmon, deducting everything which did, as a matter of fact, reduce the cost of selling these automobiles, tell me what would have been the cost to have sold these forty-three machines?

Mr. IVEY.—Object to that your Honor please. That was covered by his former answer.

The COURT.—If there is anything he didn't consider in the former answer he may state it now.

The WITNESS.—I didn't get the question.  
[176]

Mr. HALVERSTADT.—Read the question, please.

(Question repeated.) Now, is there anything which you didn't consider before in stating the cost to be sixty-one hundred dollars?



(Testimony of F. E. Harmon.)

A. You mean is there anything which should be added on to that?

Q. Added to or deducted from it.

A. There is nothing that I can recall in my mind.

Q. Very well. Then I will put it this way: What would the company have had to pay out in dollars and cents from the period beginning February 22, 1915 and expiring July 31, 1915, to have sold these forty-three automobiles?

Mr. IVEY.—I think the witness has answered that, your Honor please. He said \$6,100.00.

The COURT.—I understand that he has answered it. That is really the same question that has been asked and answered.

Mr. HALVERSTADT.—Your Honor, in looking up the authorities last night I find I will have to make an offer of testimony if I want—

The COURT.—Proceed.

Mr. HALVERSTADT.—We offer to show by this witness—

Mr. IVEY.—I object to this offer being made, your Honor, in the presence of the jury.

The COURT.—You may be excused from the courtroom, gentlemen of the jury, for a few minutes.

(Jury retires.)

Mr. HALVERSTADT.—Now, so the Court will understand the situation, I will make this very brief explanation: These items of disbursement which Mr. Harmon testified to, and which I may say for the court's guidance amount to \$790.00 a month, the Court will recall included shop [177] employees,

(Testimony of F. E. Harmon.)

and so on, to whom was paid a salary. Now, as a matter of fact, the company was charging customers for the work which was done by those men, and the company made a profit on the salary which was paid these men. Now, the same is true of other matters here. For instance, the company, if it had a contract for the sale of cars, could engage in the sale of parts with profit, but if it could not have the cars to sell it couldn't make any profit because its overhead would be entirely prohibitive. They further go ahead and sell accessories for the same reason and make a profit. They also wash and polish cars and make a profit; they also store cars and make a profit. Now, the matter which Mr. Ivey apparently doesn't appreciate is the fact that the six thousand dollars, which we have figured out in detail, includes a number of monthly disbursements which were necessary in order to conduct the business to sell these cars, but that as against those sums there are certain profits which should be deducted so that we may have the net expense which we would have incurred in selling these cars. Now, that is the situation. Now, for that purpose I offer to show by this witness that in the detailed list of the monthly disbursements which this witness testified to were included salaries of employees who were engaged in doing work for customers, and on whose work the company made a profit from the customers. Will you make your objection to that?

Mr. PILES.—Let me explain this, your Honor. This man testified that it cost \$6,100.00 to run that

(Testimony of F. E. Harmon.)

business. He received back in the course of running the business [178] something over three thousand dollars. That's what we want to show and have deducted from the \$6,100.00. In other words, the net cost of running this business was \$6,100.00 minus \$3,100.00, we will say, or \$3,000.00 in place of sixty-one hundred. The man has got himself mixed, that is all there is to my mind about it; and when he answered the cost of conducting the business was \$6,100.00 he meant that minus \$3,000.00, according to this statement, and that's what Mr. Halverstadt is trying to get the witness to testify to.

Mr. IVEY.—Your Honor please, I certainly think that the witness was given more than an opportunity—

The COURT.—I thought the witness was given every opportunity—

Mr. PILES.—Yes, but he doesn't understand it; he is mixed.

The COURT.—(Continuing.) —of stating fully in detail just what the expense was. That was my purpose.

Mr. HALVERSTADT.—Now I will make my offer again. I offer to prove by this witness that in the detailed list of expenses which he gave, which approximate \$790.00 a month, or during the five months period \$3,950.00, were included salaries of employees who were engaged, among other things, in doing repair work and washing and polishing cars for customers, on whose work the company made a profit, and that that profit should be deducted

(Testimony of F. E. Harmon.)

from the itemized list of disbursements which he made in order to determine the cost to the company, the net cost to the company of selling these cars. Now, make your objection to that specific offer.

Mr. IVEY.—I object to that for the same reason that I objected before, your Honor please, on the ground the [179] witness has had ample opportunity, and has stated specifically, after considering it very carefully, that \$6,100.00 was the cost of selling these machines. Now these other things that were done there that counsel wants to use to lower the \$6,100.00 half that were some of the things that presumably have to be done around those garages anyway; and, of course, now if we ask this witness how much he would have to knock off he would say \$3,000.00 I reckon.

The COURT.—I think we are simply consuming time. I have stated already, and did a while ago, the witness was given the opportunity, and the offer is unnecessary, because, as I indicated before the jury retired and before the offer was made, if there was anything he wanted to say or to take from the amount that he had given here he should state it.

Mr. HALVERSTADT.—May I renew that question when the jury is brought in?

The COURT.—Why yes, I have given him every opportunity. Call in the jury.

(Jury recalled.)

By Mr. HALVERSTADT.—(Q.) Mr. Harmon, in stating a moment ago that the cost of selling these cars would have been about six thousand dollars, was



(Testimony of F. E. Harmon.)

that gross or net cost?

A. That was gross cost of overhead of the place and of the cars, too.

Q. Answer yes or no, are there any items or any amounts that should be deducted from that gross cost in order to determine the cost to the company of selling these cars?

A. There would be a gross cost of overhead, of course, on [180] "parts" sales and stuff like that, on garage stuff and such as that.

Q. Then what would be the actual cost to the company at the end of the season; how much money would the company have paid out at the end of the season over and above all its receipts for the sale of these cars?

Mr. IVEY.—Object to that your Honor please, as being a conclusion and speculative. I believe your Honor has ruled against me already on something similar to that, but I make this objection to save whatever rights I can.

The COURT.—If there are any item or items he desires to deduct from the expense already given, why, let him give it.

By Mr. HALVERSTADT.—(Q.) Now, are there any items which should be deducted from that six thousand dollars?

A. Well, there would be what you might call the profit of the place which could be deducted from our overhead.

Q. All right, what does that amount to?

A. Approximately three thousand dollars.

(Testimony of F. E. Harmon.)

Q. So that the cost to the company of selling these cars would be what?

A. Around about three thousand dollars.

Q. Mr. Harmon, are you under subpoena here in this court?     A. Yes, sir.

Q. By whom were you subpoenaed?

A. Northwest Auto Company.

Q. The what?     A. Northwest Auto Company.

Q. The defendant?     A. Yes, sir.

Mr. HALVERSTADT.—I believe that is all for the present. [181] You may cross-examine, and I would like, if I may, if I have overlooked something to recall him later.

Cross-examination.

(By Mr. IVEY.)

Q. You were subpoenaed to bring some books with you, weren't you?     A. Yes, sir.

Q. You brought those books, did you?     A. Yes.

Q. Mr. Harmon, you said you had been in the automobile business for quite a while, did you?

A. Yes, sir.

Q. Is it now your contention that the cost of selling an automobile such as the Reo is about that fractional part of a hundred dollars as is represented by forty-three—I will put it this way—is  $1/43$ d of three thousand dollars?     A. How is that?

Q. Is it your contention that the cost of handling Reo machines, or machines of that type, price and grade, and so forth, costs only  $1/43$ d of three thousand dollars?

Mr. HALVERSTADT.—I will object to that ques-

(Testimony of F. E. Harmon.)

tion unless it is limited to the conditions as they existed and the situation that this company was in at that particular time.

Mr. IVEY.—I will limit it to that location.

The COURT.—Let him answer.

A. If you have gone through the worst part of a season and spent the biggest amount of what your expenses would be to sell an article, and have done the heaviest part of your advertising, and would bring it right up to the [182] immediate season, and you only had a few months in which your overhead wouldn't be any larger than it had been previous, and you could wipe off, say practically two-thirds of the expense of selling—

Mr. IVEY.—Move to strike all this answer out, your Honor, as not responsive.

The COURT.—Let him answer. Let it stand.

A. (Continuing.) Well, where we get the basis of that and where I make that statement it would cost that much, is because the blank months of the season had been gone through, and I only figure on the four or five best months of the year when those cars could be sold. That is why I base that. If I had to put in the other seven months overhead, why, then the cost would *have a* great deal greater, but that had been already paid; that isn't considered in that statement at all.

By Mr. IVEY.—(Q.) What does it generally cost to handle an automobile about that size and type and price?

Mr. HALVERSTADT.—That is immaterial, your

(Testimony of F. E. Harmon.)

Honor, unless they limit it to the unexpired term of this contract and under the conditions as they existed.

Mr. IVEY.—I want to test his veracity and his credibility and his knowledge of these things generally.

The COURT.—Let him answer.

A. It would depend all together on the condition.

By Mr. IVEY.—(Q.) It would depend altogether on the condition. Now let's go back to the first part of your testimony. Did you say that the Harmon Motor Car Company sold in the year previous to the entering into this contract with the defendant company a hundred and thirty-three cars? [183]

A. Yes, sir.

Q. How much commission did you get on each one of those cars?

A. It varied the different makes of cars.

Q. What kind of cars was it you were selling?

A. They were Reo, Lozier, Interstate, Grand.

Q. And what? A. Grand.

Q. Do you know about how many of each one of those kind you sold? A. Fifty-six Reos.

Q. Sixty-six Reos? A. Fifty-six.

Q. How many Loziers? A. Thirteen.

Q. How many Interstate? A. Twenty.

Q. And how many Grands? A. Forty.

Q. What was the commission on the Reo then?

A. Twenty-two and a half per cent.

Q. Twenty-two and a half per cent of the gross price, two hundred and twenty-five dollars. Was it a thousand dollars at that time?



(Testimony of F. E. Harmon.)

A. No, it was eleven seventy-five at that time.

Q. Well, your gross commission, then, on the Reos were about a little over two hundred and twenty-five, weren't they?     A. I couldn't say exactly.

Q. Twenty-two and a half per cent of eleven seventy-five?

Mr. HALVERSTADT.—That is a matter of computation.

By Mr. IVEY.—(Q.) Is it twenty-two and a half per cent of [184] eleven seventy-five?

A. Yes.

Q. I see. Are you sure you got the commission on the eleven seventy-five or on the ten-fifty?

A. Are you speaking of '14 or '15?

Q. I am talking about '14 now; I am talking about the year immediately preceding the year that you had this contract with the Northwest Auto Company?

A. In 1914 the list price was eleven seventy-five; in 1915 it was ten-fifty.

Q. Now, how about those Loziers; what was the selling price of those?

A. You are taking on that Reo, that is factory list.

Q. I am talking about the year, now October, 1913, and October, 1914.

A. Factory list was twenty-one hundred and thirty-two fifty.

Q. There were two prices, were there?

A. Yes, sir, a Four and a Six.

Q. What per cent did you get on those?

A. Twenty and five on the Six.

(Testimony of F. E. Harmon.)

Q. Twenty-five per cent? A. Twenty and five.

Q. Oh, twenty and five. Were there about the same number of twenty-one hundred machines sold as there were the thirty-two fifty?

A. There was eight 2100 and five 3200, 3250.

Q. Now the Interstates, how about those? How much did they sell for? A. Twenty-four.

Q. How many at twenty-four? [185]

A. The exact details I would have to look up on the Interstates.

Q. How is that?

A. I would have to go through and look up to be sure.

Q. Just approximately?

A. Approximately how many?

Q. Yes.

A. I tell you, I simply went over the names when I figured that out, I simply took the names—

Q. What was the price of the other kind?

A. Twenty-four hundred, twenty-seven fifty, and thirty-four hundred.

Q. Now, how much per cent did you get on that; what was your commission on that?

A. That varied.

Q. What was it?

A. From twenty-five per cent on up to twenty-five, five and five.

Q. Twenty-five up to five, five. Now the Grands, what were the selling price of those?

A. The principal amount of Grands were sold wholesale, and we got—I think it was five per cent

(Testimony of F. E. Harmon.)

on our wholesale business and ten per cent on our retail.

Q. Five per cent on wholesale and ten per cent on the retail. What was the selling price of those Grands? A. Five fifty.

Q. \$550.00. Now, if I understand you correctly, during that year you sold fifty-six Reos, thirteen Loziers, twenty Interstates and forty Grands at the prices you gave, you receiving on the Reos twenty-two and a half per cent commission; on the Lozier, twenty per cent commission; [186] on the Interstates, twenty-five plus some small fraction; and on the Grands, ten and five—I mean ten per cent on some of them and five per cent on the others, ten per cent on the retail and five per cent on the wholesale?

A. Also four Reo trucks.

Q. Yes. Now, did it cost you any more to sell those machines per machine during that year than it would have cost during the year from 1914, October, 1914, to October, 1915?

A. Yes, several times as much.

Q. Well, what would that extra cost amount to?

A. Why, with the Lozier, which was the car—the car in 1913 was such a lemon that all the owners were disgusted with it; the car had caused no end of trouble; there was hundreds of dollars of parts we had to replace; in fact, thousands of dollars of parts we had to replace on the cars; the agency had been shifted from one place to the other four or five different times, and naturally that hurts a car; and, as I say, the 1913 car had been very unsatisfactory, with

(Testimony of F. E. Harmon.)

everybody knocking it, and it simply meant we had to stretch a few points in order to sell it. And the Reo was a good deal the same way. The Reo had been very poorly represented here for some time, at least they hadn't done very much with it, and the territory hadn't been looked after much, there hadn't been hardly any cars placed in the territory or anything, and consequently it took a good deal of money to build it up.

Q. You had to build up the Reo?

A. Yes, sir.

Q. You had it built up very nicely. About what is the net profits on the gross volume of business in the average [187] automobile business in Seattle? Do you know what I mean?

A. Yes, I know what you mean.

Q. All right, what is it? A. The average?

Q. Yes.

A. You have got a question there that is rather hard to answer. I don't think you can strike an average.

Q. Well, what, in your opinion, is approximately the average? How much per cent did you make, for instance, for the preceding year, put it that way? I will get it even narrower than that. What per cent did you make during that year you are just talking about, I mean the year in which you sold a hundred and thirty-three cars?

A. Positively I couldn't answer.

Q. Do you know what per cent you made?

A. I do not know.



(Testimony of F. E. Harmon.)

Q. How much money did you make during that year?

A. I couldn't state that positively either.

Q. Never thought to figure that out? A. No.

Q. Did you make any?

A. Yes, I made money.

Q. How much? You have some idea? Would your books show?

A. Our books wouldn't show positively, no.

Q. What do you keep in those books, the amount it is worth and the stock you have on hand, and so forth?

A. No, we don't keep our cars in that book. In other words, it would be impossible for me to say just definitely what it would have been, what our profits would have been that year. [188]

Q. Did you run your business in such a manner you could run out at any time your present worth?

A. We couldn't figure out at any time what we were worth?

Q. Yes. A. No, we did not do that.

Q. Could you at any time figure out what your business was worth? A. Approximately, yes.

Q. Could you take your books now—

A. Our books wouldn't show it.

Q. Could you take your books and your recollection, your information about the business, and determine that? A. Not that long ago, no.

Q. Well, to come back to this other account, then. What is your opinion about the per cent I was speaking of a while ago of the volume of business that is

(Testimony of F. E. Harmon.)

made in the average automobile business here in Seattle?

Mr. HALVERSTADT.—I haven't objected, your Honor. It seems to me that is objectionable as incompetent, irrelevant and immaterial as to the issue here in this case.

Mr. IVEY.—I am going to show, your Honor, this witness has no idea at all.

The COURT.—Let him answer.

Mr. HALVERSTADT.—Exception.

By Mr. IVEY.—(Q.) What is it?

A. I will admit that I don't know, and I don't think anybody else can answer.

Q. Do you know what any automobile dealer in this town, what per cent any automobile dealer in this town, has made on the gross volume of his business at any time since you [189] have been in Seattle for any particular year?

A. Do I know?

Q. Yes. A. I can't say that I do.

Q. How long did you say you had been in the automobile business?

A. About six or seven years.

Q. Did you ever at any time figure out how much you made? A. Absolutely.

Q. You did figure it out? A. Yes.

Q. When was it?

A. Oh, you mean how much I had made all the time, all the years, or what?

Q. For a year?

A. I don't know as I ever did; no.

(Testimony of F. E. Harmon.)

Q. You don't know what it is?

A. No, never did.

Q. All right. Oh, Mr. Halverstadt, was this witness or Mrs. Harmon going to figure out the standing of the company from the beginning?

Mr. HALVERSTADT.—She.

By Mr. IVEY.—(Q.) Mr. Harmon, prior to the cancellation on our part of this contract did Mr. Vogler come up to see you?

A. I guess he did.

Q. Do you remember when that was?

A. He was up several times. You mean just very—not very long before it was cancelled, or what do you mean?

Q. I mean in the month of February, I think it was, he came up to see you in response to a telegram you sent him? [190] A. Yes, sir.

Q. You remember sending him this telegram?

A. I do.

Q. That telegram, this one that I now hand you, bearing date February 2d, I think, I think that's the 2d, is that the telegram? A. I did.

Mr. IVEY.—Mr. Halverstadt, this is that telegram, I believe. I offer this telegram in evidence.

Mr. HALVERSTADT.—Now, if the Court please, I want to make an objection here, and in order to make it intelligently I will have to ask counsel for what purpose he is offering it at this time. Probably save time in doing it. To prove that affirmative matter in your complaint?

Mr. IVEY.—Have this witness admit now that we

(Testimony of F. E. Harmon.)

cancelled this contract.

Mr. HALVERSTADT.—Very well. That is a part of the affirmative matter which is pleaded, and it is not cross-examination of this witness, not proper cross-examination; he was asked nothing of that on direct examination.

Mr. IVEY.—Counsel's objection may be well taken, your Honor. I made the offer.

The COURT.—Sustained.

Mr. IVEY.—I don't think I have any further questions to ask him at this time.

Redirect Examination.

(By Mr. HALVERSTADT.)

There is one question I think probably I overlooked asking this witness on direct examination. Have you any [191] objection to my doing so now?

The COURT.—Proceed.

By Mr. HALVERSTADT.—(Q.) What was the gross profit the company would have made in selling the forty-three cars if the forty-three cars that were sold had been delivered by the Northwest Auto Company?

Mr. IVEY.—Calling for a conclusion, your Honor please, and object to it. Immaterial anyway.

Mr. HALVERSTADT.—I would like merely to make this suggestion to the Court. If it is going to be as hard for the jury to sit down and figure out what these amounts are as it was for us last night, to get them absolutely accurate, it can't be done.



(Testimony of Mrs. Gertrude Harmon.)

The COURT.—Well, then, you haven't got it right.

Mr. HALVERSTADT.—It involved taking into consideration so many different elements.

The COURT.—If you have got it right then the jury can get it right.

Mr. HALVERSTADT.—All right. Exception. That is all.

(Witness excused.) [192]

**Testimony of Mrs. Gertrude Harmon, in Her Own  
Behalf (Recalled).**

Mrs. GERTRUDE HARMON, the plaintiff, recalled as a witness on her own behalf, further testified as follows:

Direct Examination.

(By Mr. HALVERSTADT.)

Q. Mrs. Harmon, Mr. Ivey asked you yesterday just before you left the stand whether you would go through the books and make for him a statement of the assets and liabilities of the Harmon Motor Car Company as of date of January 1st, 1914, and of date of January 1st, 1915. Did you attempt to do so?

A. Yes, sir, I did.

Q. Were you able to do so?

A. No. I worked for about four hours and I couldn't come to any—

Q. Now, state why you could not.

A. Well, for the simple reason that the company didn't take inventory, and the books, the way those books are they don't show Accounts Payable.

(Testimony of Mrs. Gertrude Harmon.)

Until a bill is paid it isn't in the books, and when it is paid of course it is not a liability. And on that statement I would have had to give the liabilities, and that would have been the accounts payable at that time, and they don't show in that set of books. The first set of books was opened by Mr. McKenna's bookkeeper, who was a bookkeeper for an advertising firm, and I don't believe he realized what system he should put in for an automobile agency; and after they had run on for about a year and a half I realized they were very inefficient, and we put on a bookkeeper whom Mr. Vogler sent up to us and recommended [193] as an old automobile bookkeeper, but his books looked to me as though they are not any more clear than the other book, and a whole lot more red tape to it. It seems it takes you an hour to get at it, and then you don't get anything. I kept the books there, but I am not an expert accountant. The way those books are I don't see how anyone could make a statement of what the assets and liabilities were of this company as far back as that; you *would* to depend entirely on you memory for it.

Mr. HALVERSTADT.—Now, if counsel desires these books we will be glad to let him have the books.

Mr. IVEY.—Which is the books from which you tried to figure?

The WITNESS.—All of those books there. There are two separate sets.

Mr. IVEY.—I would like to consider counsel's proposition, your Honor.

The COURT.—Proceed.

(Testimony of Mrs. Gertrude Harmon.)

Mr. HALVERSTADT.—That is all.

Mr. IVEY.—That is all.

(Witness excused.)

Mr. HALVERSTADT.—Plaintiff rests.

PLAINTIFF RESTS HER CASE IN CHIEF.

Mr. IVEY.—Your Honor please, I want to present a motion which the jury, I presume, will not be interested in at all. [194]

The COURT.—You may be excused until two o'clock, gentlemen of the jury.

(Jury retires.)

Mr. IVEY.—The motion, if your Honor please, that I desire to present is one for a nonsuit upon the grounds that plaintiff's evidence has failed to show that they are entitled to recover at all; and in addition thereto has shown that they are not entitled to recover, that is, the plaintiff in this case.

After argument the Court announced its ruling as follows:

“The COURT.—The motion in any event must be denied.”

to which ruling the defendant excepted and the exception was allowed.

(Jury recalled.) [195]

**Testimony of F. W. Vogler, for Defendant.**

F. W. VOGLER, produced as a witness on behalf of defendant, and having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. IVEY.)

Q. Mr. Vogler, where is your residence?

(Testimony of F. W. Vogler.)

A. Portland, Oregon.

Q. What relation, if any, do you bear to the defendant company?

A. I am president of the company.

Q. This is a Portland concern, is it?

A. It is a Portland, Oregon, company.

Q. Yes. Did you have anything to do with the making of this contract that is described in the plaintiff's complaint, which is on file here as some exhibit, I have forgotten which one, it is the one in this case, anyway. A. Yes.

Q. Did you negotiate with the Harmon Motor Car Company for the making of it? A. Yes.

Q. Which particular party of the Harmon Motor Car Company was it that you negotiated with?

A. F. E. Harmon.

Q. F. E. Harmon? A. Yes, sir.

Q. That was the witness that was on the stand this morning? A. Yes, sir.

Q. Well, were any representations made to you with reference to the nature of this company, as to whether or not it was a corporation or a copartnership?

Mr. HALVERSTADT.—Just a minute. Object to that, your Honor, [196] for the very apparent reason that there is no pleading in here which justifies any inquiry into that question whatever. Now, here is the only thing which is plead concerning it. This is found on the second page, the first paragraph of the first affirmative defense:

“That at the time the contract, Exhibit ‘A,’ at-



(Testimony of F. W. Vogler.)

tached to plaintiff's complaint was made and entered into by and between this answering defendant and Harmon Motor Car Company the said F. E. Harmon, who executed the contract for the Harmon Motor Car Company as President, represented that said Harmon Motor Car Company was a corporation, but that afterwards this defendant ascertained the fact to be that the Harmon Motor Car Company was a mere trader's name used by the said F. E. Harmon. Now, if that allegation has any purpose whatever in the action it is on the theory of a fraudulent representation; but to be actionable that representation must be made on the familiar principles we find in the books with three distinct angles to it. It must be made knowingly for the purpose of defrauding, and it actually must defraud, and it must be to the damage of the person to whom the representation was made."

The COURT.—What is your contention, Mr. Ivey, in relation to this inquiry?

Mr. IVEY.—My contention is simply this, your Honor please: We had a right to know who it was we were contracting with. Now, if this were a company of which Mr. Harmon was President, and he so stated to us, why, we should be permitted now to show that was a fact. The plaintiff said that she doesn't know what kind of a concern this [197] was, whether it was a copartnership or corporation, and I don't know right now what is going to be contended with reference to that by Mr. Halverstadt. But we did not think that it was any copartnership.

(Testimony of F. W. Vogler.)

It may be contended it was a copartnership, but I want to show by this witness that we thought it was a corporation, and subsequently we discovered, or we were advised, rather, that it consisted in Mr. F. E. Harmon himself.

(Argument.)

The COURT.—I haven't examined into it, but I don't see now that it is material at all under the issues. It may be in the course of the examination of this witness, when you get to the cause of the cancellation, that this might become material, but at this time I don't think it is.

Mr. IVEY.—It is merely laying the foundation, your Honor, please, for subsequent conversations with Harmon himself.

The COURT.—Let's get to that in the proper way.

Mr. IVEY.—All right.

Q. After you executed this contract when was the next time you came to Seattle, Mr. Vogler, if you recall, just approximately?

A. Oh, I usually came perhaps once a month, or once in six weeks, every six weeks, stopped off on my way around through the country.

Q. I ask you, Mr. Vogler, if you got this telegram that I am handing you (showing same to witness)?

A. Yes.

Mr. IVEY.—I desire to offer this in evidence.

Mr. HALVERSTADT.—We object to it as incompetent, irrelevant and immaterial to any issue which is formed by the answer [198] in this case, because, if you will look at the latter part of the

(Testimony of F. W. Vogler.)

third paragraph of the first affirmative defense, it is expressly stated there that but for the sole fact—I will read the exact language—the defendant states to the Court:

“That had the plaintiff been able to secure the capital necessary to conduct the business, and had she been able to have carried out said contract, this defendant would have been ready and willing to have had the same carried out by her as representing the said Harmon Motor Car Company. That this defendant only terminated said contract when finally informed that neither the plaintiff nor the Harmon Motor Car Company would be able to fulfill the contract or carry it out by its terms or otherwise.”

He there has plead the reason why he terminated that contract. Now, the issue is limited to one thing. Was that a valid reason which, in law, permitted him to terminate that contract? He has, as a matter of fact, by that part of his answer expressly, or in necessary effect, plead that he waived everything which appears in the answer prior to that.

(Argument.)

The COURT.—The objection is overruled. The defendant can present his theory of the issues here.

Mr. HALVERSTADT.—Exception.

The COURT.—Exception allowed.

Mr. IVEY.—I ask that this exhibit be marked Defendant's Exhibit “B,” Mr. Clerk, because we marked another one there the other day. [199]

(Testimony of F. W. Vogler.)

Telegram referred to received in evidence, marked Defendant's Exhibit "B" and made a part of the record herein.

Q. Now, Mr. Vogler, I will ask you if you came to Seattle in response to this?     A. Yes.

Q. And did you visit Mr. Harmon or not?

A. Not when I first came up, no.

Q. Who did you visit, if anybody, in connection with the Harmon Motor Car Company?

A. I went to the office where the agency was conducted and saw Mr. Harmon and Mr. Thornton.

Q. Have any conversation with them about this matter?     A. Yes.

Q. Tell us what that conversation was.

A. Well, I stated why I was coming, why I came up, and asked what the trouble was—I hadn't heard anything of it at that time—and I was informed by Mr. Harmon what the trouble was.

Q. What did she say the trouble was?

A. That Mr. Harmon, in this particular case, had been out, taken a car out joy-riding, taken some women out with him and insulted them and left them on the road, and finally picked them up and brought them into town, and they complained on *his* and had him arrested and put in jail.

Q. Did you subsequently see Mr. Harmon on that same trip?

A. I saw him, I think, after—he got out after I was there four or five days, and I saw him up in my room, hotel room, one night.



(Testimony of F. W. Vogler.)

Q. Did you have any talk with him about this conduct that you said his wife told you about?  
[200]

A. Yes.

Q. What did he say about it, if anything?

A. He couldn't deny it. He said—he told me at that time he got just about what he deserved. And as far as he was concerned he was ready to leave the country; and he put the company in bad, the agency in bad.

Mr. HALVERSTADT.—Now, just a minute. We object to that on the ground it is pure hearsay as to the plaintiff, and move to strike the testimony as to what occurred between Mr. Harmon and Mr. Vogler.

Mr. IVEY.—That brings us right back to that question we had a few minutes ago.

The COURT.—The motion is denied.

Mr. HALVERSTADT.—Exception.

The COURT.—What rights the plaintiff has are predicated upon the rights connected with the witness Harmon, and the conversation would be proper.

By Mr. IVEY.—(Q.) Did you say anything to Mr. Harmon at that time about the cancellation of this contract?

A. Yes, I took it up with her and said that *they* way the conditions were surrounding the agency there would be only one thing for us to do, and that would be to cancel the contract, or make other arrangements to have different representation.

Q. What did he say as to that, what did Mr. Harmon say as to that statement of yours?

(Testimony of F. W. Vogler.)

A. Well, he said he didn't blame me for taking that view of it.

Q. Did you after that time see Mrs. Harmon?

A. After that?

Q. Yes. [201]

A. Yes.

Q. What was the occasion of your seeing her?

A. Well, I simply wanted to take it up further with her, the matter of the agency.

Q. Speak a little louder, if you please.

A. I say, I wanted to talk the matter over further with her.

Q. And what conversation, if any, did you have with her regarding the cancellation of the agency?

A. Mrs. Harmon asked me if she could continue. I told her we didn't want to work any hardship on her, and if she could show us where she could continue it we would be only too glad to allow her to continue it, but not under that name, we couldn't stand it under that name any longer, and she was perfectly willing to reorganize and get a new company and go ahead, and I told her if she could raise the money that I would consider it. And she asked me how long I would hold off, and I said a week or ten days if necessary, but I would have to do something pretty soon.

Q. And did she take any steps, or did you take any steps for her in regard to seeing if she could get this money?

A. I asked her where she thought she could raise it, and she said that she thought her mother could

(Testimony of F. W. Vogler.)

raise it for her, and I said all right, it didn't make very much difference to us where it was raised as long as the money, the necessary capital, was raised to conduct the business. I waited a couple of days and asked her about it, and there was nothing being done, and I asked her nearly every day I was there *there* what she was doing. She hadn't done anything. Then I suggested that their bank might be able to [202] do something. But I waited a couple of days and there was nothing done in the bank. I asked her if I could go and see the bank and help her out in it? She said I might.

Q. Did you go? A. I did.

Q. What was the result?

A. I saw the president—

Mr. HALVERSTADT.—Just a minute. That is pure hearsay again.

The COURT.—Sustained as to what the president said, or conversation in the absence of the plaintiff, unless this was communicated to the plaintiff.

Mr. IVEY.—I think, if your Honor please, if she sends Mr. Vogler down to the bank to make inquiries he should be permitted to state what he found out.

The COURT.—No, I don't think so.

Mr. IVEY.—I would like an exception, your Honor.

Q. Then what is the next thing that happened with reference to your negotiations with Mrs. Harmon?

A. Well, after I got the information from the bank

(Testimony of F. W. Vogler.)

that I got there I told her that I didn't think there was any show for her—

Q. You went back and told her there wasn't any show for her?

A. Yes, there wasn't any show for her, after a conversation I had with the president of the bank she couldn't expect to get any help there. And I told her that it would have to be up to us to make the change.

Q. I hand you a document that is marked Defendant's Exhibit "A" and ask you if you received that telegram? A. Yes.

Mr. IVEY.—I offer that in evidence. [203]

Mr. HALVERSTADT.—Object to it on the ground it is incompetent, irrelevant and immaterial. This telegram is one that was offered the other day, and it is dated subsequent to the date of the cancellation.

Mr. IVEY.—It is the telegram that your Honor examined yesterday, and goes to show the very negotiations that the witness is testifying about now were being carried on, that is, to get another agency. It wasn't the contention that the old agency still existed, but that it was another one. I would like to have your Honor take a look at it if there is any question in your mind about it.

The COURT.—Overruled.

Mr. HALVERSTADT.—Exception.

Telegram referred to received in evidence, marked Defendant's Exhibit "A" and made a part of the record herein.



(Testimony of F. W. Vogler.)

By Mr. IVEY.—(Q.) Mr. Vogler, did you come to Seattle in response to that telegram?

A. No, I don't think I did.

Q. Why didn't you come to Seattle in response to it?

A. Well, we had made arrangements, just about made arrangements with somebody else to represent us.

The COURT.—What is the date of that?

Mr. IVEY.—That is February 24th, your Honor please, two days after the cancellation.

Q. Had you already sent out that notice of cancellation that has been talked about here, and which is in this complaint, which bears date February 22d?

A. I think we had, yes.

Q. Been sent out. Mr. Vogler, there was something said in the plaintiff's evidence about who drew this contract, [204] who prepared this contract. I will ask you to state to the jury who, in fact, does prepare these contracts that you get these agents to sign?

A. The factory who we get our cars from, the Reo factory.

Q. I will show you one of the contracts that the Harmon Motor Car Company had with one of its subagents and ask you if that, too, is one of those factory contracts?

A. Can I compare it with that (indicating)? (Handing paper to witness.) I think it is the same thing.

Q. The same contracts?      A. Yes.

(Testimony of F. W. Vogler.)

Q. I believe you testified that you told Mr. Harmon that the contract was at an end. Now, if your Honor please, I think I am at this time permitted to show that Mr. Vogler thought this was a company, a corporation, of which Mr. Harmon was president, in view of the fact he dealt only with Mr. Harmon in the matter of the cancellation of the contract. I will ask that question and let your Honor rule on it. What representations, if any, were made to you at the time this contract was entered into as to what this Harmon Motor Car Company was?

Mr. HALVERSTADT.—Just a minute. We object to that for the same reason that we spoke of before. What would be the use to maintain a complaint on my part that John Jones had misstated to me a certain fact if I would be compelled to admit that John Jones never changed my opinion one particle by that false statement, or if I were compelled to admit that I knew the falsity of that statement at that time, that I didn't act on it, that it made no difference to me one way or the other? It would be an [205] utter waste of time. Now, the question isn't disposed of yet in this case, so far as I recall, was it a partnership or was it a corporation? Furthermore, the evidence clearly shows that the Harmons believed implicitly they were a corporation organized under the name of the Harmon Motor Car Company. Now, it is fundamental they couldn't deceive anybody actionably unless they did it deliberately and knowingly.

(Testimony of F. W. Vogler.)

The COURT.—Let him answer.

Mr. HALVERSTADT.—Exception.

By Mr. IVEY.—(Q.) What representations were made to you, if any?

A. They were a corporation and Mr. Harmon was president.

Q. Now, at that time, Mr. Vogler, was this note that is referred to and made a part of this contract at the time you came up here to Seattle in response to the telegram, that is, about February 2d, was this note paid up? A. It was not; no.

Q. Did you have any talk with either Mr. Harmon or Mrs. Harmon with reference to the payment of that note? A. Yes.

Q. What was said about it? Just state which one you had the conversation with?

A. Why, I rather think with both of them, what conversation I had was with both of them.

Q. Did you make a demand for the payment of the note? A. Yes.

Q. What response did they give you?

A. Well, they couldn't pay it.

Mr. IVEY.—I think that is all at present. [206]

Cross-examination.

(By Mr. HALVERSTADT.)

Q. Mr. Vogler, have you any recollection about the date in February, 1915, that you came to Seattle in response to that telegram?

A. It was that same evening. I came in on the date of that telegram, whatever it is.

Q. You left Portland on the date of that telegram?

(Testimony of F. W. Vogler.)

A. I am inclined to think I did, at 11:00 o'clock that night.

Q. But if it wasn't exactly at that time it was very, very shortly afterwards, wasn't it?

A. I think so, yes.

Q. Mr. Vogler, do you remember coming in my office in the Hoge Building on that occasion, that is, when you were in Seattle on that trip?

A. Sometime during that trip, yes, I was in your office.

Q. Now, do you remember what you asked me there? Answer yes or no.

A. I remember,—not all of it, it is nearly three years ago.

Q. Didn't I tell you fully all the facts and circumstances connected with it, that is, with Mr. Harmon's actions? A. No, sir, you did not.

Q. I did not? A. No, sir.

Q. Didn't I read to you a copy of the divorce complaint, my office copy of the divorce complaint in that case, and tell you that that was substantially all I knew, except some other little details that I told you? Isn't that a fact?

A. I don't remember it. You might have.

Q. Isn't it a fact that you and I discussed that particular [207] question?

A. The question of the—

Q. That is, the question of Mr. Harmon's actions?

A. Yes, we discussed it.

Q. Yes. And didn't I tell you then that my interest in the matter was in protecting Mrs. Harmon in



(Testimony of F. W. Vogler.)

the business up here?

A. I don't remember particularly. You might have. It might have come up in the conversation.

Q. Yes. And didn't I tell you that we had taken assignments of Mr. Harmon, of the stock that he had in the McKenna company, I mean of all his right in that company?

A. I don't remember anything of it if you did.

Q. You do not? A. I certainly do not.

Q. Let me call one circumstance to your attention and see if this will not bring it to your attention. Don't you recall my going and calling to your attention a carbon copy of this original assignment which was introduced in evidence here, this one which is marked Plaintiff's Exhibit "1"; and further, don't you recall that I told you that that instrument, the original of that instrument, had been filed in the office of the County Auditor of King County for record and had not yet been returned?

Mr. IVEY.—Your Honor please, I object.

A. I don't remember it.

Mr. IVEY.—I object to that on the theory that I mentioned to your Honor before lunch. This is not an assignable contract and would have no effect anyway.

The COURT.—Overruled. [208]

Mr. IVEY.—I would like an exception.

By Mr. HALVERSTADT.—(Q.) Don't you recall that, Mr. Vogler? A. No, I don't recall that.

Q. Now, would you say that that is not the fact?

A. Well, as far as my—

(Testimony of F. W. Vogler.)

Q. If you will please answer yes or no, then if you want to explain then do so.

A. I don't recall of having this—

Q. Please answer yes or no.

The COURT.—If he doesn't recall it I think that answers it.

By Mr. HALVERSTADT.—(Q.) You do not recall it? A. No.

Q. All right. Now, Mr. Vogler, did you not at that time say to me that you would be very glad to have Mrs. Harmon continue that agency under her own management?

A. Why, I testified that a while ago under certain conditions.

Q. I say, didn't you say that to me on that occasion when you were in my office?

A. I said that I said that to her; yes.

Q. And did you not say it to me?

A. Under the conditions that I required. I might have said it to you.

Q. Didn't you further say that Mr. Thornton being with her, and being a very efficient man, she had all the help she needed?

A. I couldn't very well say that I said that, knowing the conditions between Mrs. Harmon and—at that time I couldn't say it.

Q. But would you say that you didn't say it?

A. I don't know how I could say it knowing the conditions [209] between them.

Q. All right. And didn't you say to me that the Harmon Motor Car Company had up with your com-

(Testimony of F. W. Vogler.)

pany at that time a \$750.00 deposit, and that the cars which had been sent in were promptly paid for, that the draft attached to the bill of lading for cars which had been sent in were promptly paid for?

A. I don't remember telling you that; no, sir.

Q. Would you say that you did not?

A. Well, I wouldn't say that I would or wouldn't. I don't remember that conversation coming up. I don't know what would bring it up at that time.

Q. And didn't you tell me at that time that you were very sympathetic with Mrs. Harmon because of the fact that the cars had not been delivered to her when she needed them so badly?

A. Oh, I might have said it. I don't remember. I don't recall those things no more than I would to say anybody would be out of luck that don't get cars.

Q. Didn't you come back to my office a second time?

A. I don't remember coming the second time, no. As I remember now it was terminated at that time, the thing was decided, my opinion was given to you at that time.

Q. And didn't you tell me at that time you would let Mrs. Harmon keep that contract and continue that business?

A. Providing certain conditions were carried out, the same as I testified a while ago, and told her that I would.

Q. Very well.

A. And I also told you that it couldn't be done at

(Testimony of F. W. Vogler.)

that time, I remember that, and we decided to let it drop at that. [210]

Q. Tell me this, did you not at that same time mention the subagencies which had been created by the Harmon Motor Car Company and call attention to the number of cars which the Harmon Motor Car Company had sold?

A. I don't think so, because I don't suppose I knew. That matter comes through Mr. Clark.

Q. I don't mean definitely in numbers, but a considerable quantity?

A. That is a matter that I don't take up. That comes up through Mr. Clark. He has that information and I haven't got it.

Q. And didn't you further say to me that one of the reasons you were particularly anxious to let Mrs. Harmon have that contract and were going to let her have it was because she had—they had carried it through the dry months of the year—I don't remember the exact term you used—but that portion of the automobile year in which there were little or no sales?

A. No, sir; I don't remember of making that statement.

Q. And that having sold these cars, and the season coming right on, she was entitled to the benefit of the sales they had made?

A. I don't remember of making such a statement to you.

Q. Would you say that you didn't make it?

A. I would just as leave say I didn't as I did.

Q. Yes, sir. Now, as to these contracts, Mr. Vog-



(Testimony of F. W. Vogler.)

ler, this form of contract which Mr. Ivey mentioned to you, I believe you said that they were forms which were prepared by the factory, was that correct?

A. Yes. [211]

Q. What relation does the Northwest Auto Company, that is the defendant in this case, occupy with reference to the factory? Are you an agent, or what are you? A. We are an agent.

Q. You are an agent? A. Yes, sir.

Q. When it came to letting this contract to the Harmon Motor Car Company you, as agents of the factory and on behalf of your own corporation, insisted that that form of contract be signed, did you not?

A. I don't know as we would necessarily insist on it.

Q. That is the contract you presented for signature, is it not? A. Oh, that we did.

Q. Yes. A. Oh yes, yes; yes.

Q. In fact, that was the only form of contract that you would have let him sign, was it not?

A. Oh, we might have, under some conditions, let him sign a different form. It wasn't compulsory, I don't think, but it is the form that is used, we all use.

Mr. HALVERSTADT.—That is all for the present.

Redirect Examination.

(By Mr. IVEY.)

Q. You referred to some conditions that existed between Thornton and the plaintiff at the time you were talking to Mr. Halverstadt? A. Yes.

(Testimony of F. W. Vogler.)

Q. What conditions are those you had in mind?

Mr. HALVERSTADT.—That is immaterial, your Honor. [212]

Mr. IVEY.—I don't think so.

The COURT.—Any conditions that were communicated?

Mr. IVEY.—Yes, sir.

The COURT.—Anything you said?

Mr. IVEY.—Well, I will withdraw that question and put it this way: Did you have any talk with Mr. Thornton as to his relations with Mrs. Harmon at that time? A. Yes.

Q. Mr. Thornton was in the employ of Mrs. Harmon, of this Harmon Motor Car Company, at that time, was he? A. Yes.

Q. Well, just state why you think that you wouldn't have told Mr. Halverstadt that Mr. Thornton was a good man and would be sufficient help to Mrs. Harmon,

Mr. HALVERSTADT.—We object to that on the ground it is incompetent, irrelevant and immaterial, and plainly calls for hearsay testimony.

The COURT.—Any reason that he communicated either to Mr. Halverstadt or Mrs. Harmon he may state, but none that he has in his mind now have been communicated.

Mr. IVEY.—I think the conversation he had with Mr. Thornton, if your Honor please, in regard to the nature of this business would be permissible. Thornton was in their employ, an agent of theirs.

The COURT.—I don't think so.

(Testimony of F. W. Vogler.)

Mr. IVEY.—I would like an exception, your Honor.

The COURT.—Unless made in the presence of the plaintiff.

By Mr. IVEY.—(Q.) Did you have any conversation with Mrs. Harmon about Thornton?

A. Yes. [213]

Q. What was that?      A. The conversation?

Q. Yes.

A. Well, Mrs. Harmon—I mentioned perhaps the organization—

Q. Just speak a little louder, please.

A. In going over the matter I mentioned Mr. Thornton in connection with Mrs. Harmon, and he seemed to be very repulsive to her; she wanted nothing to do with him as a manager or wanted him around there in any capacity.

Q. Now, you said that your company was an agent for the factory. What kind of contract have you? Is your contract anything similar to the contract you have with the Harmon Motor Car Company?

A. In form, yes; it is along about the same lines, yes.

Q. One of those printed forms?      A. Yes.

Q. And that is what you mean by your being an agent of the factory?      A. Yes.

Mr. IVEY.—I don't believe there is anything further.

Recross-examination.

(By Mr. HALVERSTADT.)

One question I should have asked on cross, Mr. Ivey.

(Testimony of F. W. Vogler.)

The COURT.—Proceed.

By Mr. HALVERSTADT.—(Q.) Mr. Vogler, who were the new agents you appointed here in Seattle after you cancelled the contract?

A. The Puget Sound Motor Company; Sharpe & Leader, I believe.

Q. Did you use the same form of contract in making an agreement [214] with them that you used in making the contract with the Harmon Motor Car Company?

A. I believe it would be the same, yes, sir.

Mr. HALVERSTADT.—That is all.

Mr. IVEY.—That is all.

(Witness excused.) [215]

### **Testimony of Albert Burke, for Defendant.**

ALBERT BURKE, produced as a witness in behalf of the defendant, being first duly sworn, testified as follows:

#### **Direct Examination.**

(By Mr. IVEY.)

Q. What is your full name? A. Albert Burke.

Q. Where do you live, Mr. Burke?

A. Everett, Washington.

Q. What is your business?

A. Automobile business.

Q. How long have you been engaged in that?

A. 1914.

Q. Still engaged in it? A. Yes, sir.

Q. Do you know Mr. F. E. Harmon, who is in court? A. I do.



(Testimony of Albert Burke.)

Q. Did you ever have a contract with the Harmon Motor Car Company?   A. I did.

Q. Under what name was it?

A. Harmon Motor Car Company.

Q. Is this the contract (showing same to witness)?  
I refer to Plaintiff's Exhibit No. 5.   A. It is.

Q. You executed that contract for your company?

A. I did.

Q. And I will ask you whatever became of that contract? Did you undertake to carry it out, or did you cancel it?   A. In the 1914?

Q. Yes. [216]   A. Carried it out.

Q. That is the 1914 contract?   A. It is, yes.

Q. Doesn't that cover cars—maybe you have got hold of the wrong one. Well, did you have another contract besides this?

A. We had a contract in 1915.

Q. What time of the year was that?

A. I don't remember that. I think it was made out just after that one, after the expiration of that one.

Q. This one was dated the 3d of December, 1914.

Q. 1914? Well, it is the 1915 contract, then.

Q. Is this the one you carried out?   A. Yes, sir.

Q. You got all your machines under this contract?

A. The 1914? No.

Q. Well, I think possibly we misunderstand one another. This is dated on the 5th of December, 1914, and calls for—

A. Twenty cars to be delivered.

Q. Twenty cars. And I want to know if this contract was carried out?   A. It was not, no.

(Testimony of Albert Burke.)

Q. Why wasn't it carried out?

A. The change in the agency.

Q. Change in the agency. Did you ever have any talk with Mr. Harmon in regard to the cancellation of this contract with his company?

Mr. HALVERSTADT.—Now, just a minute. When?

By Mr. IVEY.—(Q.) Did you ever have one with him? A. I did. [217]

Q. When was that? About when was that conversation that you had with Mr. Harmon?

A. That was some time—I think it was in February.

Q. February of what year? A. '15.

Q. What was the occasion—

Mr. HALVERSTADT.—Fix the date a little closer, will you?

Mr. IVEY.—Do you know what part of February?

Mr. HALVERSTADT.—No, I don't know.

By Mr. IVEY.—(Q.) Well, is there any incident that occurred about that time by which you can approximately determine the date?

A. Why, it was the time right after the cancellation of the contract from the Northwest Auto Company to the Harmon Motor Car Company.

Q. About what time was it, Mr. Burke, with reference— Did you know about this trouble, about getting in jail up here? A. I did.

Q. Well, what time was it with reference to that incident? A. Why, it was right after that.

Q. Right after he got in—

(Testimony of Albert Burke.)

Q. In jail, yes.

Q. Had he gotten out of jail at the time you had this conversation, or did you have it in jail where he was?     A. No, he got out of jail.

Q. Do you know about how long he stayed in jail?

A. I don't know. I should judge along about two or three days.

Q. What was the occasion of your going to see him at that time? [218]

Mr. HALVERSTADT.—Just one minute, your Honor. If this is going to lead into any conversation with Mr. Harmon there is a very obvious question in regard to that. Mr. Harmon severed his connection prior to that, and anything he said would be unauthorized so far as the Harmon Motor Car Company was concerned.

Mr. IVEY.—We never considered, your Honor, please, that contract to be signed, and it hasn't been proved—

Mr. HALVERSTADT.—We haven't taken an assignment of that contract to this day, Mr. Ivey.

Mr. IVEY.—His getting out of that company was not communicated to our company, and that is just what I proved here a few minutes ago, that he was the man we were dealing with at all times, and we have, of course, the right to show what conversations were had with the principal, or the assignor, in an action by the assignee. I don't think there is any question about that. I am going to show by this witness that he cancelled this contract with F. E. Harmon when this thing happened up here in Seattle. I think

(Testimony of Albert Burke.)

I am entitled to do that.

Mr. HALVERSTADT.—This is a perfect surprise to the plaintiff, I will say that. We never knew anything about it. And I submit one of two things must appear, either that Mr. Harmon was authorized to take whatever action he did take so far as the plaintiff is concerned, or the action must have been had and the conversation carried on in the presence of the plaintiff, or it may be, third, that she later approved it.

The COURT.—He may answer the question.

The WITNESS.—What was the question? [219]

Q. (Question repeated.)

A. Because I had a deposit of \$250.00 up on my contract, and when I learned that the contract was cancelled by the Northwest Auto Company I went ahead to withdraw my \$250.00, and I went to see Mr. Harmon and Mrs. Harmon and Thornton.

By Mr. IVEY.—(Q.) Will you speak just a little louder, Mr. Burke?

A. (Continuing:) I went to see Mr. Harmon to withdraw my \$250.00 that I had up as a deposit on my contract, and I seen Mr. Harmon, Mrs. Harmon and Mr. Thornton, and they were not in a position to give me the refund, but I got the refund by buying a car that they had on the floor, issued my check for it, stopped payment on the check until such time the \$250.00 was made good.

Q. Well, was there any other reason for your going to see Mr. Harmon about that time? A. No.

Q. Well, did you tell Mr. and Mrs. Harmon your



(Testimony of Albert Burke.)

contract was cancelled with them?      A. I did.

Q. What reasons did you assign?

A. For the reason I couldn't get any more service on cars.

Q. Couldn't get any more service out of them?

A. No, sir.

Q. And what kind of service was it that they were not furnishing you?      A. On delivery of cars.

Q. Well, did you assign any other reasons?

A. The reasons were, they were supposed to have cars there at certain dates there for me, which they did not have. [220] I had to go down to the bank and take the bill of lading, take up the bill of lading with my own checks, go down to the freight-house with my own check, pay freight, payment on the bill of lading for trucks that come in, and they were supposed to have these cars and trucks delivered at their place of business; consequently there was—

Mr. HALVERSTADT.—Now, just one minute. In view of the fact there was a written contract between these parties I move to strike so much of the answer as stating that it was supposed to be thus and so.

The COURT.—The supposition will be stricken out and the jury will disregard his answers so far as based upon supposition.

By Mr. IVEY.—(Q.) Well, state what you did actually do with reference to having to go down to the bank and get the bill of lading? Just go ahead with that and just leave out what was supposed to have happened.

(Testimony of Albert Burke.)

A. I went to the bank and took up the bill of *ladings*. Also to the—

Q. Then how did you get your car?

A. Go down to the warehouse and help *unlead* them.

Q. And what reasons did Mr. Harmon assign for putting you to that trouble, if any?

A. Didn't have the financial—did not have the money.

Q. What financial do you refer to?

A. Didn't have the money to take up these cars.

Q. Did you get any cars from him on this contract at all? A. On that contract? Yes.

Q. How many? [221] A. About ten.

Q. Well, did you have any trouble with those that you got? A. I did.

Q. What trouble was it that you had?

A. One car that is supposed to have been a new car was a car that had been used as a demonstrator and refinished.

Q. Well, what representations, if any, were made to you with reference to this being a new car?

Mr. HALVERSTADT.—Now, if the Court please, I don't want to—

The COURT.—Just make your objections.

Mr. HALVERSTADT.—I object on the ground it is incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Mr. IVEY.—Your Honor please,—

The COURT.—You are not trying any issue between him and this other company.

(Testimony of Albert Burke.)

Mr. IVEY.—I pleaded it, your Honor please, that the conduct of this Harmon Motor Car Company was such as to bring the Reo machine in ill repute, and I am now proving that his conduct was not such as would have been expected, reasonably been expected from anybody who conducted his business properly.

The COURT.—Sustained.

Mr. IVEY.—Like an exception.

Q. Were there any other reasons besides those that you have already given why you cancelled your contract with the Harmon Motor Car Company?

A. No.

Mr. IVEY.—That is all at present. [222]

Cross-examination.

(By Mr. HALVERSTADT.)

Q. The reason you cancelled your contract with the Harmon Motor Car Company for the year, for the season of 1915, was because its contract had been cancelled by the Northwest Auto Company, was it?

A. And business relations were not pleasant.

Q. But that was the principal reason?

A. Correct.

Q. And you wanted to get your deposit back?

A. I got my deposit back.

Q. Now, that was the time when you had the conversation with Mr. Harmon, was it?

A. And Mrs. and Mr. Thornton.

Q. If cars had been delivered to you at the times they were to have been delivered according to that contract, could you and would have carried out that contract?

(Testimony of Albert Burke.)

Mr. IVEY.—Object to that as calling for a conclusion, your Honor please. The witness testified to two reasons why he cancelled that contract. One was because he couldn't deliver cars and the other was because their relations were very unpleasant.

The COURT.—He may answer.

Q. (Question repeated.)

A. I would not.

By Mr. HALVERSTADT.—(Q.) Were you financially able to carry out that contract?

A. I was.

Mr. HALVERSTADT.—You were. Yes, sir. That's all. [223]

Redirect Examination.

(By Mr. IVEY.)

Q. What relations were those you referred to as being unpleasant between you and the Harmon Motor Car Company?

A. Delivering a car to me, a second-hand car, as a new car.

Mr. HALVERSTADT.—Object to that. That is objected to as incompetent, irrelevant and immaterial. The rights between these parties are fixed by the contract.

Mr. IVEY.—Opposing counsel brought out the fact there were two reasons—

The COURT.—I have already ruled on this question as to the second-hand car. That is not the issue here.

By Mr. IVEY.—(Q.) I didn't get your answer to that question when Mr. Halverstadt asked you



(Testimony of Albert Burke.)

whether or not, if the Harmon Motor Car Company had been able to furnish you with the cars, as to whether or not you would have kept your contract with them?     A. I would not.

Q. You said you would not?     A. No, sir.

Q. Why would you not have kept your contract with them?

A. Because the business relations were unpleasant, weren't pleasant.

Mr. HALVERSTADT.—I move to strike the answer because the contract does not provide for cancellation on such a contingency.

The COURT.—The answer is stricken.

By Mr. IVEY.—(Q.) Well, what were the facts that caused you to cancel this contract in addition to not having furnished you the cars? [224]

Mr. HALVERSTADT.—We object because it is incompetent, irrelevant and immaterial. Their rights are fixed by the contract. Until counsel can point out a breach of that contract—

Mr. IVEY.—The witness says he wouldn't have—

The COURT.—Sustained. The witness can't determine the law.

Mr. IVEY.—Well, if your Honor please, the witness might right at this time state a good and sufficient reason, and I will state that in my opinion it would be an absolute defense.

The COURT.—Well, let him state it, then, aside from what I have already ruled on.

By Mr. IVEY.—(Q.) Were there any other rea-

(Testimony of Albert Burke.)

sons, then, besides this incident about that automobile?

Mr. HALVERSTADT.—Same objection, your Honor.

The COURT.—Let him state it.

A. Why, his way of doing business, the time he was arrested and going in jail.

Q. Now, if I may go on to state any further instance,—

Mr. HALVERSTADT.—We object to a general discourse to the answer.

The COURT.—Yes, I must sustain the objection, because we are not trying out the issues between the Harmon Motor Car Company and this witness; that's a new issue entirely; that is not before the Court.

Mr. IVEY.—Like an exception, your Honor.

The COURT.—Noted.

Mr. IVEY.—That is all. [225]

Recross-examination.

(By Mr. HALVERSTADT.)

Q. Mr. Burke, how many Reo automobiles did you sell between the cancellation of this contract of the Harmon Motor Car Company and July 31, 1915?

A. I haven't got the number, but I would judge about ten cars.

Q. About how many?      A. About ten.

Q. What was the reason you didn't sell more than ten?

A. That's all there were to be sold.

Q. You sold your full allotment?

(Testimony of Albert Burke.)

A. Yes. You can only sell so many.

Q. In other words, did you sell the full allotment that you contracted for?

A. I don't remember the contract.

Q. Twenty? A. Twenty, yes.

Mr. HALVERSTADT.—That is all.

(By Mr. IVEY.)

Q. How many of those did you get from the Harmon Motor Car Company?

A. I got about ten, I should think.

Q. And then you got ten from the other?

A. Sharpe & Leader, the Puget Sound Motor Company.

Mr. IVEY.—That is all.

(By Mr. HALVERSTADT.)

Q. Isn't it a fact you only got five?

A. I was called on this case on a few minutes' notice, and [226] I haven't the records with me nor the account with me.

Q. All I want to know, Mr. Burke, was whether your recollection was so clear that you would state definitely that it wasn't just five that you got from the Harmon Motor Car Company?

A. No, I wouldn't state.

Mr. HALVERSTADT.—That's all.

Mr. IVEY.—That is all.

(Witness excused.) [227]

**Testimony of W. J. H. Clark, for Defendant.**

W. J. H. CLARK, produced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. IVEY.)

Q. Mr. Clark, what is your full name?

A. W. J. H. Clark.

Q. Where is your residence, Mr. Clark?

A. Portland.

Q. What business are you engaged in?

A. Secretary of the Northwest Auto Company.

Q. That is the defendant in this case?

A. Yes, sir.

Q. Were you engaged with this company at the time this contract involved in this suit was made?

A. Yes, sir.

Q. I will ask you, Mr. Clark, if you had any telephone conversations with Mr. Thornton, of the Harmon Motor Car Company, along in the fall of 1914 relative to the delivery of the cars under this contract?

A. I believe that Mr. Thornton did call up over the long distance 'phone once or twice. Might have been more, but once or twice I think he did call up.

Q. Well, what was the conversation you had with him on those times, if you recall?

A. Well, he would ask whether we got any cars—that is in the fall of 1914—whether we had got any



(Testimony of W. J. H. Clark.)

cars down there, and I would answer him, "No, we had not."

Q. You said you were Secretary?

A. Secretary, yes, sir. [228]

Q. Well, do you attend to the correspondence between your company and its subagents generally?

A. Yes, a good deal of it.

Q. Do you know whether or not at any time Mr. Thornton ever gave you any specifications as to any particular cars that they would require under that contract? A. I have no recollection of any.

Q. What were his demands, what did they consist in when he did ring you up?

A. Of course, it was a general conversation, and he would state that they could sell cars, that they wanted cars, and all I could reply was that we hadn't got any and we couldn't tell—

Mr. HALVERSTADT.—I move to strike the latter part of the answer to the effect of the witness saying he hasn't got any, because under the provision in the contract the condition which excuses non-performance must be affirmatively pleased, and it is not done.

Mr. IVEY.—I ask to amend the pleadings to that extent, your Honor please.

Mr. HALVERSTADT.—We object to that because it will put an issue in here that will force a continuance.

Mr. IVEY.—They can't plead surprise, because Thornton said he was informed at that time the reason why they didn't furnish more cars was because

(Testimony of W. J. H. Clark.)

they did not have them. They knew that all along; they can't be surprised at it at all. Thornton admitted that, and they all say they knew all the time everybody was having a lot of trouble.

The COURT.—As I said a moment ago, this isn't an action to recover damages for nondelivery, this is an action to [229] recover for damages claimed to have been sustained by reason of a wrongful revocation of the contract, and I don't think that this is material one way or the other.

Mr. IVEY.—I noticed that was your Honor's construction of this suit a while ago on the ruling. As I said at the time, I don't know whether the plaintiff is seeking to recover both upon the theory that we did not deliver the necessary number of cars up to the time the contract was cancelled and also for the profits they would have made on those cars that hadn't been delivered at the time the contract was cancelled. There seemed to be two theories.

The COURT.—If it is contended here on the part of the plaintiff that the manufacturing concern were unable to furnish cars as provided by this contract during the time of this contract that would be material, but up to the point of cancellation, why, that would not add anything to the testimony upon which the jury ought to conclude, and what obtained after that up to this point, it is not material.

Mr. IVEY.—Well, if it is understood, your Honor please, between the Court and counsel and myself that they are not undertaking to recover for our not having furnished the full quota of cars down to the

(Testimony of W. J. H. Clark.)

time the contract was cancelled, then I can see there is no materiality in this answer *I eliciting*, except this: It is contended by plaintiff that they were entitled to forty-three more cars than those that were contracted for. They say they sold nine and contracted for a certain number more, and they were entitled to still a certain number more. Now, I think I can show your Honor that this evidence that I am [230] asking the witness about now would go to show that they were not entitled to forty-three more besides those they contracted for, because the number we were to furnish them depended on our ability to get them from the factory. Now, if we weren't able to get those cars from the factory, why, I don't see how they would have been entitled to forty-three, nor how they have been entitled to damages, nor to any profits they would have made on forty-three, because the only profits they would have made would have been on those cars we could have furnished them under our contract. That brings us right back to that factory proposition. They have the same clause in their contract with their subagents. Your Honor is ruling that out against me?

The COURT.—Yes. I will allow an exception.

By Mr. IVEY.—(Q.) Mr. Clark, do you know whether or not that note that is referred to in this contract between the Harmon Motor Car Company and the defendant company was ever paid?

A. It was not paid in full.

Q. Has it ever been finally settled up?

A. There was some payments made on it, and then

(Testimony of W. J. H. Clark.)

if the deposit which was put up by the plaintiff was taken into account, of course, the note would then be satisfied, but not taking the deposit placed by the plaintiff into account the note would not be satisfied.

Q. Well, what deposit, now, do you refer to?

A. They said—I have heard that they placed \$750.00 on deposit. That is not so, according to our records.

Q. How much money did you have, how much money did you get [231] down there?

A. They first of all placed a sum of five hundred dollars. Then they placed a further sum of two hundred dollars, making seven hundred dollars. And then very nearly a year later they placed another sum of five hundred dollars, making a total sum of twelve hundred.

Q. That twelve hundred was placed with you, then, in connection with some other contracts than this one that is being sued on, you say a year later?

A. Yes. It wasn't always understood to be on the Reo contract, so far as I know. Those are the same as all money that were placed on deposit.

Q. Now, did you say you had to use that \$750.00 to pay the balance on this note?

A. There never was a sum of \$750.00 paid.

Q. Well, what about that twelve hundred dollars you spoke about?

A. The twelve hundred dollars—to pay the note a portion of that twelve hundred dollars would have to be taken into account, which was the deposit on the contract.



(Testimony of W. J. H. Clark.)

Q. Well, when was the note finally settled up by you making the application of this \$750.00 on the note?

A. The note really has never been absolutely settled up, the way I understand it, unless the money which is on—

Mr. HALVERSTADT.—We move to strike that out because he says “I understand it.”

A. I would judge that and say according to our books.

Mr. HALVERSTADT.—We ask to have the books produced.

By Mr. IVEY.—(Q.) Have you the books?

A. I have the ledger sheets there. [232]

Q. Do you make your entries in that originally? Let's see your ledger sheets.

A. They are right in that case, Mr. Ivey (indicating).

Q. In this case (indicating)? A. Yes.

Q. (Handing papers to witness.)

A. That is it.

Mr. HALVERSTADT.—I would like to ask Mr. Clark a question: In whose handwriting are these figures on this sheet Mr. Ivey holds?

A. They are in the handwriting of the bookkeeper who was in our employ at that time.

Q. Are these the original entries?

A. Those are the original entries.

Mr. IVEY.—Your Honor please, I didn't want to bring that bookkeeper up here.

The WITNESS.—The bookkeeper is no longer in

(Testimony of W. J. H. Clark.)

our employ, but those entries were made under my authority, under my orders. She was under my orders all the time.

By Mr. IVEY.—(Q.) You ever check up these entries to see whether they are correct or not?

A. Those entries have been all checked, not only by me but by a firm of accountants.

Q. And you know this represents the payments that were made on this note?

A. On the deposit account.

Q. On the deposit account?      A. Yes.

Q. What is this other sheet (indicating)?

A. That sheet doesn't belong to it. I guess it was pulled [233] out.

Q. Did you have any other accounts with the Harmon Motor Car Company except that one?

A. Oh, yes, we have a Car Account and a Parts Account.

Q. But this is the Note Account?

A. This is the Deposit Account.

Q. Well, how about those other accounts that you speak of, were they all settled up?

A. No, sir, they were not. The Parts Account was not settled.

Q. The Parts Account was not?      A. No.

Q. Do you know how much the balance due on the Parts Account was?

A. Somewhere around the neighborhood of \$530.00.

Q. Now, if I understand you correctly, the \$750.00 which was being held as a deposit under this con-

(Testimony of W. J. H. Clark.)

tract was used to pay the balance due on this note?

A. Yes, whatever money was used to pay the balance of the note.

Q. When was that application made?

A. That application was made somewhere around about the end of February.

Q. After the—

A. After the cancellation of the contract.

Q. After the cancellation of the contract?

A. Yes, sir.

Q. Do you recall ever having notified the Harmon Motor Car Company of that application?

A. Recall notifying—Oh, yes, I wrote them many times in regard to it. [234]

Q. Have you that bunch of letters that we had?

A. I think you have them.

The COURT.—Take a recess for a few minutes.

(RECESS.)

By Mr. IVEY.—(Q.) Leaving that subject of that note for the present, and calling your attention—the Court is now of the opinion that I may ask you as to why you didn't furnish more cars than you did to the Harmon Motor Car Company up to the time that the contract was cancelled. I will ask you as to what the reasons were you didn't furnish more cars to the Harmon Motor Car Company than you did up to the time the contract was cancelled?

Mr. HALVERSTADT.—We object to that on the ground that there is no pleading which will permit the introduction of such proof. It is a matter which must be affirmative plead.

(Testimony of W. J. H. Clark.)

Mr. IVEY.—An oversight of mine. I now ask the Court to permit me to amend my answer so as to show that the reason why—

Mr. HALVERSTADT.—May I suggest this: Will you dictate to the reporter the additional affirmative defense you want put in?

Mr. IVEY.—Yes, I will do that. That the defendant did not furnish to the Harmon Motor Car Company up to the time the contract was cancelled the full number of cars provided for in said contract to be furnished prior to that time, up to that time; that the defendant furnished all of the cars to the Harmon Motor Car Company during that period of time that it could procure from the manufacturer of the Reo machines that were not allotted under the contract, [235] under the conditions thereof, to other agencies; and that if the Harmon Motor Car Company suffered damage by reason of not getting the entire number of cars that is called for or that is mentioned in said contract it was through no fault of this defendant company, but was due to the fact that the defendant company could not procure these cars from the manufacturer, that is, a sufficient number thereof to furnish Harmon Motor Car Company with said number.

Now, that is the first amendment that I ask your Honor to permit us to make, and when that has been ruled upon I shall ask for a further amendment.

Mr. HALVERSTADT.—We object to the amendment at this time in the midst of the trial.



(Testimony of W. J. H. Clark.)

The COURT.—I think the amendment should be allowed.

Mr. HALVERSTADT.—Exception. The record may show the affirmative matter is denied by a reply?

The COURT.—Yes.

Mr. IVEY.—Oh, yes, by stipulation. Now, I ask the Court at this time to permit me to allege affirmatively as follows:

That if the contract in question had not been rescinded or cancelled by the defendant company that the defendant company would not have been able to furnish the Harmon Motor Car Company the entire number of cars specified in the contract between the dates of the cancellation of the contract and the termination thereof, for the reason that it, the defendant, could not have procured a sufficient number from the manufacturer to so furnish these, and to furnish the other orders that are referred to in the contract. [236]

I call your Honor's attention to the fact that in that contract it says "provided these cars are not ordered, or covered by orders, and providing we can get them from the factory," which is a condition that they seem to incorporate in all these contracts. I ask the Court to let me make that amendment.

Mr. HALVERSTADT.—Make the same objection. And it is likewise a repetition.

The COURT.—What is the objection, Mr. Halverstadt?

Mr. HALVERSTADT.—It is a mere repetition of the former, is it not?

(Testimony of W. J. H. Clark.)

The COURT.—The former limits it to the February time, to the cancellation of the contract, and this takes it from that time on?

Mr. IVEY.—Yes, sir. I anticipated your Honor's ruling might be different on the two periods of time.

The COURT.—Well, I look at it differently. I want to know what the objection is.

Mr. HALVERSTADT.—There are two objections. The first one is that it stands admitted this contract was cancelled and that we thereby were prevented from getting cars. Now, it doesn't lie in the mouth of this defendant to say, "It is true I cancelled your contract and put you out of commission, but if I hadn't I couldn't have given you the cars." There is an inconsistent position taken there. It can take one of two things, one position or the other, but it can't take both at the same time.

The COURT.—What is the next ground of the objection?

Mr. HALVERSTADT.—The ground that occurred to me I don't think is good. I didn't notice the two referred to different [237] periods of time, I thought it was a mere repetition, but that ground alone, it seems to me, is ample. I don't think it incorporates the language in the contract either.

The COURT.—I think that the same rights of the parties that are set forth in the contract would be carried forward and the benefits would inure to both or either party, and the cancellation of the contract would not foreclose the party against any right that he has under the contract nor give him any benefit

(Testimony of W. J. H. Clark.)

which the contract might provide, so that I don't think that the objection is well taken. That is, if the defendant could have defended against a charge of nonsupply of these machines upon the ground that they didn't get them from the factory, then they certainly should be permitted to avail themselves of the same right in an action for nondelivery by reason of the cancellation of the contract, and so if that is the only objection the second amendment may likewise be made.

Mr. HALVERSTADT.—Exception.

The COURT.—Yes. You may proceed.

By Mr. IVEY.—(Q.) Mr. Clark, do you remember how many cars you furnished under this contract up to the time it was cancelled; you remember offhand?

A. Up to the time of cancellation?

Q. Yes.

A. We furnished to the Harmon Motor Car Company, I believe, ten cars all together.

Q. That was up to the time the contract was cancelled. Do you remember when the last shipment went in? You can refer to exhibits to find out.

A. The last shipment of cars went in in February.  
[238]

Q. Was that the shipment that was referred to in one of these exhibits yesterday? It was in a letter, I think, which was dated February 15th.

A. I believe that was the date.

Q. That was the shipment referred to in this letter (exhibiting paper to witness)?

A. Yes, that is the shipment referred to. It was

(Testimony of W. J. H. Clark.)

delivered to them in February.

Q. Who wrote that letter, you?

A. I wrote that letter; yes, sir.

Q. Well, did you know at the time you wrote that letter that that contract was going to be cancelled?

A. No, I did not, not at this time, not on February 15th.

Q. How many were in that shipment?

A. Four cars in that shipment.

Q. Is that a part of the ten that you said the Harmon Motor Car Company got?

A. That is a part of the ten.

Q. You mention a Six in there. Did you ever get that Six for them? A. No, sir.

Q. Where were those cars being sent from?

A. Sent from Lansing, Michigan.

Q. From the factory?

A. From the factory at Lansing, Michigan.

Q. Well, did all the cars that you furnished the Harmon Motor Car Company come direct from Lansing, Michigan, or some of them come up from Portland?

A. I think one come from Portland—or two come from Portland out of the ten, and eight were shipped directly from the [239] factory.

Q. Now, just briefly, Mr. Clark, state why you didn't furnish more cars than you did? You furnished ten, you said, and Mr. Thornton said that he rang you up a number of times and asked you to furnish those cars. Why didn't you furnish them?



(Testimony of W. J. H. Clark.)

A. We could not furnish them; we didn't have them to furnish—

Q. Tried to get them?

A. —owing to the factory not being able to deliver.

Q. You did your best to get them, did you?

A. We did the best we could. We spent—I suppose our telegraph bill amounted to something like seventy or eighty dollars a month. We telegraphed the factory every night.

Mr. HALVERSTADT.—That is immaterial, your Honor, and I move to strike that matter in regard to the telegrams.

The COURT.—That answer will be stricken and the jurors will disregard it.

By Mr. IVEY.—(Q.) Now, Mr. Clark, did you have any difficulty in getting the number of cars that you expected to furnish these out of from the time this contract was cancelled until July 31, 1915? Just answer yes or no.

A. Yes, we did have considerable difficulty.

Q. Well, if this contract had not been cancelled how many more cars besides these ten would you have been able to furnish to the Harmon Motor Car Company, if any?

Mr. HALVERSTADT.—Now, we object on the ground that having cancelled this contract they are not now in a position to say, "It is true we cancelled the contract, but we couldn't have fulfilled it anyhow." It is incompetent, irrelevant and immaterial,

(Testimony of W. J. H. Clark.)

and that the amended matter [240] in the answer does not constitute a defense.

The COURT.—Oh, he may state whether the factory was unable to furnish these cars by reason of preceding orders for cars.

Mr. HALVERSTADT.—Let me make this suggestion, your Honor: That answer would be subject to secondary evidence only, would it not, unless the question was that he knows of his own knowledge?

The COURT.—Oh, it must be competent testimony, according to the provisions of the contract, whether the factory was unable to furnish the cars in the order in which they were—

Mr. HALVERSTADT.—May I cross-examine on that one point how to determine whether he does know that of his own knowledge?

The COURT.—You may ask him whether he knows.

(By Mr. HALVERSTADT.)

Q. Do you know of your own knowledge the condition that existed in the factory, aside from what somebody told you, or what you read in a letter, or otherwise?

A. Not from personal knowledge of the factory, no.

Q. Whatever knowledge you got you got how?

A. From written and telegraphic information from the factory.

Mr. HALVERSTADT.—We object, then, on the ground it is not the best evidence.

By Mr. IVEY.—(Q.) What became of your tele-

(Testimony of W. J. H. Clark.)

graphic correspondence to the factory about it?

A. Our correspondence with the factory up to July, 1915, has been destroyed.

Q. Why was that destroyed?

A. We keep—owing to the bulk of correspondence we have down there we have an enormous amount of correspondence with the [241] factory. We do not keep more than two years' correspondence in our files.

Q. Who destroyed this particular correspondence, do you know?

A. Our head stenographer, Miss La Febvere.

Q. Where does she live?

A. She lives in Seattle at the present time.

Q. Do you know who she is working for?

A. She is working for the George S. Bush custom house brokers, George S. Bush Company.

Q. In the Colman building?

A. Yes, sir, in the Colman building.

Q. And you know of your own knowledge that correspondence was all destroyed? A. I do, sir.

Q. Now, I ask you this, if you know how many cars you would have been able to furnish out of the cars that you were able to get from the factory to the Harmon Motor Car Company under this contract if the contract had not been canceled? Just answer yes or no, if you know how many you would have been able to furnish? A. Yes.

Q. How many would you have been able to furnish?

Mr. HALVERSTADT.—We object to that on the

(Testimony of W. J. H. Clark.)

ground it is incompetent, irrelevant and immaterial, and according to his own statement his knowledge is pure hearsay, that which he got from correspondence. Now, your Honor, I take it the rule of law is this, that a rule which would permit a factory back there to say, "Oh, we can't furnish you cars," write a letter to that effect, that letter be entered in evidence as conclusive proof against us, and [242] we not be permitted to cross-examine on the ultimate fact whether the factory was able to furnish cars, is not a rule of law. Now, this witness has clearly shown that his knowledge is pure hearsay. Even if these letters and these telegrams were not destroyed and were offered in evidence they would be subject to the same objection as not the best evidence.

The COURT.—Let me see the contract.

Mr. IVEY.—I have a copy of it, your Honor (handing same to the Court).

Mr. HALVERSTADT.—Furthermore, referring to previous contracts, we would have the right to inquire of the company as to every contract which was in existence at that time, and to prove the exception they would have to submit the best evidence of those things.

The COURT.—I think the question may be answered.

Mr. HALVERSTADT.—Exception.

Mr. IVEY.—Answer the question.

A. I would think we would have been able to supply them with fifty cars, forty-five to fifty cars.



(Testimony of W. J. H. Clark.)

Q. Altogether?

A. From the unexpired—from the date of the cancellation to the date of the termination; that is, in addition to the ones that we supplied.

Q. In other words, then, you could have furnished them about sixty-five cars altogether?

A. About sixty-five cars.

Q. Mr. Clark, how long have you been in the automobile business?     A. Since 1908; nine years.

[243]

Q. At the time this contract was canceled were you an officer of the company?

A. Yes, sir, secretary of the company.

Q. How many trustees in your company?

A. Three directors.

Q. Directors you call them?     A. Yes.

Q. Who were they?

A. Mr. F. W. Vogler, president, Mr. Frank D. Vogler, vice-president, and myself, secretary.

Q. Did you three directors, at the time this contract was canceled, know anything about it or not?

A. Oh, yes.

Q. Know anything about the fact that the contract was about to be canceled by Mr. Vogler? In other words, did you know he was about to write this letter?

Mr. HALVERSTADT.—That would be immaterial if the company has adopted the act of some unauthorized party, and that is conclusively shown by the fact we have been here two days.

(Testimony of W. J. H. Clark.)

Mr. IVEY.—You will agree this was done by authority—

Mr. HALVERSTADT.—So far as this is concerned this is a company act.

Mr. IVEY.—Done by authority of the directors, too, I suppose?

Mr. HALVERSTADT.—They can't now claim it was the act of an unauthorized agent and put us out of court.

Mr. IVEY.—You don't know what the witness is going to say.

Mr. HALVERSTADT.—I can only assume—

The COURT.—Let him answer.

By Mr. IVEY.—(Q.) Was it done by authority of all three of [244] you directors?

A. Yes, sir.

Mr. HALVERSTADT.—We object to that. That is immaterial.

The COURT.—It is answered. Proceed.

Mr. IVEY.—I think that is all, Mr. Halverstadt, at this time.

Cross-examination.

(By Mr. HALVERSTADT.)

Q. Mr. Clark, it is a fact, is it not, that very shortly after this contract in suit was signed the Harmon Motor Car Company were asking for cars, is it not?

A. Oh, I would say within thirty days, yes.

Q. Very shortly after? A. Yes.

Q. And they were always wanting to get cars during the entire time of the contract, were they not?

A. I wouldn't say always.

(Testimony of W. J. H. Clark.)

Q. But they did call you up several times, you say, asking for cars?

A. I recollect Mr. Thornton calling up on two occasions.

Q. And didn't he tell you on those occasions to send him any kind of cars you had, irrespective of the size, or model, or color, or anything else, just so they were 1915 Reos?

A. I have no recollection of that.

Q. But you did know, did you not, they wanted all the cars you could give them?

A. Oh, I presumed that they did, yes.

Q. You knew that they wanted all the cars you could give them, did you not?

A. No, I did not know. [245]

Q. And no one on behalf of the Northwest Auto Company did know that fact?

A. I am not able to answer that question. I can only speak for myself.

Q. Now, you knew the subcontracts they had, did you not? A. Oh, yes.

Q. You knew the number of cars they had agreed to furnish, didn't you? A. Yes.

Q. And you are not complaining now, are you, that they weren't taking cars if you could give them to them? A. No.

Q. You have no complaint on the number of cars sold at all, have you? A. No.

Q. They sold all the cars, and more, you say, than you could furnish?

A. Well, yes, possibly they did.

(Testimony of W. J. H. Clark.)

Q. Did you ever communicate with the Harmon Motor Car Company in any way, or, furthermore, suggesting, you could furnish them cars they didn't take?     A. No, sir.

Q. Now, Mr. Clark, so far as concerns the existence of any condition at the factory at Lansing, Michigan, whatever you know about it came from correspondence, letters, telegrams, and so on?

A. Exactly.

Q. You are not speaking of anything that you may have learned if you ever were there during this period?     A. No, sir. [246]

Q. You are not, you say?

A. I am not speaking.

Mr. HALVERSTADT.—Now, I move to strike out the testimony of the witness as to the condition existing there because it is clearly hearsay; it's a self-serving declaration by the testimony. If admissible testimony could be offered against us we would have the right to cross-examine the original source from which that testimony came. Now, if we are to be put in the position that this does put us in, then it would follow that if the factory wants to make a statement that for all practical purposes is gospel truth we have absolutely no chance whatever to question it, to question them, to find out whether the statements in their letters or telegrams are correct or whether they are not, and for that reason we move to strike the testimony concerning the same. Now, they are pleading an exception here which, under the ruling of the Court, if it has been proven



(Testimony of W. J. H. Clark.)

in that manner, we then are in a situation where, without an issue in that case in ten months, we have got to meet the one thing which is either going to let the defendant out or wreck the plaintiff. Now, it is for that reason, and particularly because the situation is that, that I submit that we ought to have the right to examine the original source of information, and not simply be confronted not only with a letter written by somebody who knew the conditions, but without the slightest criticism of the witness, be confronted not only with that, but with the frailty of human recollection. Now, it seems to me, your Honor, that the testimony should be stricken. [247]

The COURT.—What do you think about it, Mr. Ivey?

(Argument.)

The COURT.—This is the contingency, that is, it is “due to strikes, floods, accidents, or any other cause beyond the control of the manufacturer or seller, whether occurring in the plant of the manufacturer, or in that of any concern from which the manufacturer or seller purchases parts or equipments.” And I hardly think that the Court could accept a letter of the concern, some one connected with the concern, and deprive the other side of the opportunity of cross-examination upon the facts upon which the conclusions in the letter are based. I think that the Court must strike that testimony.

Mr. IVEY.—Like an exception, if your Honor please.

The COURT.—Yes. And the testimony of the

(Testimony of W. J. H. Clark.)

witness, gentlemen of the jury, that they were unable to get cars from the manufacturer is stricken and withdrawn from your consideration.

Direct Examination (Resumed).

(By Mr. IVEY.)

Q. Calling your attention, Mr. Clark, to that clause in the contract to the effect that the number of cars you were to furnish the Harmon Motor Car Company, which reads as follows: "Subject to the prior orders of other dealers," how many cars, how many orders from other dealers besides the Harmon Motor Car Company did you have with reference to the number of cars that you were able to get from the factory?

Mr. HALVERSTADT.—We object to that on this ground, that there [248] is an ambiguity in the contract in that particular, "Subject to the prior orders of other dealers." From whom? "And as the business of the manufacturer will permit." That is subject to the prior orders of other dealers from the manufacturer and as the business of the manufacturer will permit. Now, bear in mind the rule which the Supreme Court of the United States has adopted, to the effect that if one of two parties has prepared a contract and there is any construction of that contract required it will be construed most strongly against the party who prepared it. The obvious answer to counsel's question, to counsel's position is that if it was the purpose to cover the Northwest Auto Company in that clause the Northwest Auto Company would have been mentioned,

(Testimony of W. J. H. Clark.)

and we object to the testimony for that reason, invoking the rule of a strong construction of that contract against the defendant. Further than that, the contracts themselves are the best evidence, the orders.

The COURT.—I don't think there is an ambiguity here. It says it shall be "subject to the prior orders of other dealers and as the business of the manufacturer—" going back to the first clause of this paragraph. I think the question may be answered.

Mr. HALVERSTADT.—Exception. I make this further objection, that is, that it is pure hearsay. Let them produce the orders.

The COURT.—Well, I am presuming it would be competent testimony.

Mr. HALVERSTADT.—All right.

Mr. IVEY.—Read the question, please. [249]

Q. (Question repeated.) What I mean is about what per cent?

Mr. HALVERSTADT.—Now, that is just beating the devil around the bush, your Honor. That is proving what is in writing indirectly, which is pure hearsay, and this is not the best evidence.

Mr. IVEY.—The only thing I want to show is that we did the best we could. I am willing to show exactly how many cars were furnished that other company.

Mr. HALVERSTADT.—All right. Now, you can show that by producing the orders. Under the Court's ruling we have nothing to say if those orders are produced.

(Testimony of W. J. H. Clark.)

By Mr. IVEY.—(Q.) Have you those books here, Mr. Clark?

A. Well, those would be the contracts. Now, I believe that we still have them in Portland. We would have to get them from Portland.

Q. Do those books you have up here show how many cars you sent to Sharpe & Leader?

A. Oh, yes.

Q. That's what I am talking about. A. Yes.

Q. Did you have the same kind of contract with Sharpe & Leader that you had with the Harmon Motor Car Company?

A. To my best knowledge and belief we did.

Q. Or whatever the name of them was.

A. The Puget Sound Motor Car Company.

Q. They succeeded the Harmon Motor Car Company? A. Yes, sir, they did.

Q. And have you your books here to show how many cars you furnished them?

A. No, those books are in Portland. [250]

Q. I mean how many cars you furnished the Puget Sound Motor Car Company? You haven't those books with you?

A. I haven't the books, no. Those are still in Portland. I know how many we furnished them.

Q. How many?

Mr. HALVERSTADT.—We object to that.

Mr. IVEY.—I withdraw that. When you come back bring that book with you, will you?

The WITNESS.—Yes.

Mr. IVEY.—I think I have no further questions



(Testimony of P. E. Sands.)

at this time, Mr. Halverstadt.

Mr. HALVERSTADT.—There will be no cross-examination at this time if he is to go back on the stand again on these other matters.

(Witness excused.) [251]

**Testimony of P. E. Sands, for Defendant.**

P. E. SANDS, produced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. IVEY.)

Q. Mr. Sands, you live in Seattle?

A. Yes, sir.

Q. How long have you lived here, Mr. Sands?

A. Nine years.

Q. What business are you now engaged in?

A. Automobile business.

Q. How long have you been so engaged in the automobile business?     A. Nine years.

Q. What car do you handle?     A. Studebaker.

Q. Where is your place of business; I mean what part of the city of Seattle?

A. Broadway, near Pike.

Q. Did you ever know anything about the Harmon Motor Car Company at the time they were handling the Reo cars?     A. Not very much.

Q. Mr. Sands, do you know about what per cent of the volume of business that is handled by the average motor car concern, such as the one you are handling, is made annually as profits? Just answer yes or no first.     A. Yes.

(Testimony of P. E. Sands.)

Q. What would you say is about the best profit that is made annually on the volume of business handled by a concern run reasonably well? [252]

Mr. HALVERSTADT.—Now, we object to that on the ground it is incompetent, irrelevant and immaterial. If I, for instance, happen to have a plant which is run economically, well, carefully and otherwise, the damages which are coming to me for the breach of a contract by Mr. Ivey are not to be measured by the carelessness of someone else. Let him bring the conditions existing in this plaint into the question and then we will have something different.

Mr. IVEY.—I asked the witness if he knew anything about this Harmon Motor Car Company.

Mr. HALVERSTADT.—And he said he didn't.

Mr. IVEY.—I want to get this witness to put the upper limit on the profits. Mr. Harmon himself this morning made the preposterous statement that he had never in his life figured out what his profits were, and could not do so at this time. I am going to show this Court and this jury that there isn't a single motor car company in this city that has ever at any time made more than three per cent on their volume of business. I am going to show your Honor by Mr. Sands' testimony, and show the jury by his testimony, that more than half of them go busted—I mean fail completely. Pardon my street language. If a company is run very, very successfully and most economically I will let Mr. Sands give the upper limit and counsel can cross-examine him as long as he likes. Mr. Sands is eminently qualified; he has

(Testimony of P. E. Sands.)

been running this business for a long while. There was some suggestion made a day or two ago by parties to this suit they made fifteen per cent. Your Honor, I have got to meet that; there is the whole point. If they kept their books, if the Harmon Company [253] had kept its books, that's where you would go to find out about how much they would make, but they didn't keep any books. They have a lot of things here nobody can make out. That is what I wanted with that information, how much they were worth at the beginning of 1914 and 1915. I was going to subtract that, one of those from the other, and then it would be possible to tell you gentlemen just about what they were making. I think that question is proper.

The COURT.—I think the objection must be sustained for this reason: Mr. Sands' business, or some other business, is not a matter which is a proper subject of expert testimony. It would be in the line of expert testimony. The profits of a concern are subject to calculation. The plaintiff in this case testified with relation to the profits, the cost of the car, the sale price, and items of expense that went into the consummation of sale. Now, the witness might, I think, properly testify as to various items of expenditures that enter into sales and necessary for the consummation of sales of cars; and further, to determine whether the items that were incorporated by the other side are all of the items of expense, or whether the expenditures given are those that are usually paid. But to ask him what per cent his

(Testimony of P. E. Sands.)

business brings him, what per cent of profit, as a criterion by which the jury shall measure the recovery of the plaintiff, I don't think would be permissible.

Mr. IVEY.—I think your Honor misunderstood me on this question. I was careful not to ask him about his business. I asked him about the business generally handled in Seattle, [254] asked him if he knew of the profits of business of that kind in Seattle.

The COURT.—Well, I think that even would be more objectionable. I don't think that would be permissible. Because that is not a subject of expert testimony, it is not a matter of common knowledge.

Mr. IVEY.—It is a little hard to get at, your Honor please.

The COURT.—Yes, I appreciate that.

Mr. IVEY.—From the condition of the plaintiff's books.

The COURT.—Yes.

Mr. IVEY.—Otherwise I could have gotten it right there.

Q. Mr. Sands, I call your attention to some items of expense that Mr. Harmon stated were the expenses of running his business. Would the fact that he had a garage here in Seattle—where is his garage?

Mr. HALVERSTADT.—Pike and Boylston, northwest corner.

By Mr. IVEY.—(Q.) Pike and Boylston, northwest corner, and that he had a contract, which I will



(Testimony of P. E. Sands.)

show you, which is calling for one hundred and ten Reos for the season running from October, 1914, to July, 1915, and to the fact that he testified that in handling those machines his items of expense were the following: He stated the items of expenses of running that garage are as follows: He paid \$225.00 for rent; salaries, one man was \$150.00, another man was \$80.00, and still a third man was \$60.00, and for a mechanic it was \$60.00, and still a *fifty* man, \$65.00; and that his telephone bills, \$9.50, that is the regular telephone; and that the toilet articles were \$1.00; long distance 'phone about \$20.00; advertising, \$50.00, and demonstration, \$30.00 a month. Those items I gave you [255] were the items of the gross cost of running this business, such as the one that I have mentioned to you, and I will ask you if, in your opinion, a business of that kind could be run on items of that kind, and if not, what other items there would have to be and what would be the change in the cost?

Mr. HALVERSTADT.—We object to that on the ground that it is incompetent, irrelevant, immaterial and entirely too general, no qualification shown by the witness..

Mr. IVEY.—The witness says he has been in this automobile business for ten years.

The COURT.—He can go into the items of expense.

A. Can I see that list?

Mr. IVEY.—I don't know if you can read my writing (handing paper to witness).

(Testimony of P. E. Sands.)

A. Is this the list right here, Mr. Ivey (indicating)?

Q. Yes. There is some on this page (indicating), a long distance 'phone bill, \$20.00, an advertising bill, \$50.00, and demonstration bill, \$30.00. Those are the ones that are left out of there.

A. I would say, in answering that, that with a contract of—how many cars, you say?

Q. Forty-three, I think,—no, at that time he had a contract for one hundred and one cars.

A. How many?

Q. He was undertaking to handle a hundred and one of the Reos, besides a few other cars, which I don't think make any particular difference here.

Mr. HALVERSTADT.—Aren't you mistaken? The testimony was, the items of expense Mr. Harmon testified to is the [256] expense which would be necessary for the sale of the remaining forty-three cars.

Mr. IVEY.—I understand he did sell those and wouldn't have any expense at all.

Mr. HALVERSTADT.—Our contention is the expense we had incurred in selling the other cars was paid for. That is the profit we are entitled to if we had the cars.

Mr. IVEY.—It is your contention, then, and your witness testified, that these would be the items of expense incurred per month in handling these forty-three cars which you didn't get.

Mr. HALVERSTADT.—Correct.

By Mr. IVEY.—(Q.) All right, assume you have

(Testimony of P. E. Sands.)

forty-three cars to handle—or I will change that question in this way, Mr. Sands, to make it simpler, I think, for everybody: How much expense do you think that a garage—or what items of expense would a garage have to go to in selling forty-three cars such as the Reo? You are familiar with the Reo cars, of course. Could you give me the items of expense that would be incurred in selling it?

Mr. HALVERSTADT.—Now, your Honor, we object to that on the ground it is incompetent, irrelevant, immaterial, entirely general, takes into consideration not at all the conditions that existed there. What probative value would it have for one man selling forty-three cars to say it would cost so much money irrespective of conditions? One firm may have a very expensive sales organization, they may be all hired help, they may be all drawing salaries. As in this case, that isn't always true. They may be able to get a good rent. [257]

The COURT.—He may answer if there is any item or items.

Mr. HALVERSTADT.—Exception.

By Mr. IVEY.—(Q.) State the average garage, Mr. Sands, and tell me what items of expense, in your opinion, would be incurred in the handling of forty-three cars such as the Reo?

A. Well, if they were simply going to sell forty-three cars and go out of business, and not be prepared, or had no hang-over expense from having run a business, or anything of that kind, simply going to run forty-three cars and quit, why, it could be

(Testimony of P. E. Sands.)

done at a very small figure. I think that there would be some expenses added to this. I think fifty dollars a month—do you want me to criticise these amounts here?

Q. Yes.

A. I think fifty dollars a month advertising is very small; and such expenses as light—I don't know whether they had any power or not in their place, electricity. And there is always an expense for what we call "policy" work—free repairs. That is quite an item, and every sale that is made is subject, in most places, to a five per cent, at least, commission.

Q. What do you think about that item they have down there for demonstration?

A. Well, that would depend altogether on how many demonstrating cars they ran.

Q. What is the average cost of demonstrating?

A. I would say thirty dollars would run one car a month. In other words, thirty dollars a month would pay the upkeep cost of one demonstrator, keeping it in condition, [258] buying the gasoline and oil, and so forth, provided they sold that car before the tires wore out.

Q. Now, assume that the company was not going to sell just these forty-three machines, but expected to continue business, what would you say, then, as to those costs, as to those items there?

A. Well, I should say that some of this would be about twenty-five per cent of what it ought to be.

Q. Some of those items there are about one-fourth



(Testimony of P. E. Sands.)

of what they ought to be?     A. Yes, sir.

Q. Which ones, for instance?

A. I don't know. I have added these up. They amount to about \$550.00. And my experience in running an automobile business is that \$2,000.00 a month expense is very, very small, and a concern that equips itself to sell even a hundred cars a year, and it could be expected to take in trade seventy-five automobiles, or fifty perhaps, to market those, in selling those hundred would have to have an organization that would certainly cost at least \$2,000.00 a month.

Q. About \$2,000.00 a month. And if that forty-three machines could be sold in the period of five months the cost of selling these might amount to as much as \$10,000.00, that is, the garage cost?

A. No, I wouldn't say that. I will qualify that, as I did in the first place. If they expected to sell those cars and quit—

Q. Yes, but I am assuming they would pay out about \$10,000.00 from the time they started selling them to the time they [259] quit selling them if they kept the business going, and so forth?

A. Yes, if they kept on going, expecting to do business.

Mr. IVEY.—That is all.

Cross-examination.

(By Mr. HALVERSTADT.)

Q. How many salesmen would it take to sell forty-three cars, Mr. Sands, according to the figures you are giving us? \$2,000.00 a month overhead?

(Testimony of P. E. Sands.)

A. In what length of time?

Q. From February 22, 1915, to July 31, 1915.

A. Why, it wouldn't take more than one.

Q. It would take more than one? A. No.

Q. Suppose you had more orders on hand than you could fill, how many salesmen would it take? None, wouldn't it?

A. No, if you had them all sold it wouldn't take any.

Q. Suppose you had more orders on hand than you could fill, would you as an experienced automobile man, say you should go ahead with a heavy advertising business? A. No.

Q. Now, as a matter of fact, what a business of that sort would cost depends on innumerable conditions, doesn't it? A. Yes.

Q. None of which have been mentioned here, or at least just a very small fraction of them, doesn't it? Just a very few of the conditions mentioned here which you would have to have to give a reasonably intelligent answer to those questions, isn't that true? [260]

Mr. HALVERSTADT.—Yes. I move to strike the witness' testimony.

The COURT.—The motion is denied.

Mr. HALVERSTADT.—Very well. I will go further.

Q. Now, what particular items are too low, Mr. Sands?

A. Well, there are no items mentioned except rent and salaries and telephone and toilet.

(Testimony of P. E. Sands.)

Q. All right.

A. I don't know of any automobile business that can get away with that kind of expense; I never heard of one.

Q. Do you know anything about or were you acquainted with the Harmon Motor Car Company's business at that time?     A. No, sir.

Q. Knew nothing about it?     A. No, sir.

Q. Didn't know anything about their internal organization?     A. No, sir.

Q. And yet you would be willing to say on your oath that that business, for that length of time and for that purpose, couldn't be run on that monthly expense?

A. Do you want me to say what I think? That's all I can say.

Q. Well, if I understood the Court's ruling you are not giving expert testimony.

The COURT.—His best judgment.

A. Well, my best judgment is just as I have testified, that he could not.

By Mr. HALVERSTADT.—(Q.) Now, as a matter of fact, the list of expenses that were given here total \$790.00; they are not all on there. You think that is way out of proportion, do you? [261]

A. \$790.00 a month? Yes, I do.

Q. And you still think that it would take about \$2,000.00 a month to sell those cars during that time when you had more orders than you could fill?

A. I qualified my answer by stating if a man expected to keep on doing business.

(Testimony of P. E. Sands.)

Q. Well now, leave that out of the question. Suppose you have before you an established business for the purpose of selling forty-three more cars; now, what would you say would be the fair monthly expense for that purpose? Now, isn't it true, Mr. Sands, that you can't tell on the facts that have been put before you? A. No, I can't tell exactly.

Q. And isn't it true that nobody else could tell on the facts that have been put before you?

A. I don't know.

Mr. HALVERSTADT.—That is all.

Redirect Examination.

(By Mr. IVEY.)

Q. You mean to say you can't tell exactly what it would cost?

A. No, I didn't say that. I say I can't tell what it would cost the Harmon Motor Car Company, as I understood his question.

Q. No, you misunderstood counsel's question. The question was what it would cost, generally speaking, that is the question he asked you, what it would cost generally speaking.

A. Well, generally speaking is, I think, too general. If I had forty-three cars to sell I could go out and sell them [262] myself on my own initiative and have no other expense, but if I have got a business to maintain and an organization to maintain while I am doing that, then there is expense.

Q. That is the expense you were testifying about a few minutes ago? A. Yes, sir.

Q. You are assuming you had a garage such as



(Testimony of P. E. Sands.)

you have here in Seattle—

A. I am assuming that we have a garage with a service car, with service men, with salesmen, with advertising expense, and policy repair expense, and light, heat, and power bills, and the stock of parts to maintain, and the various other expenses that go with the automobile business, a going concern.

Q. And that you expect to conduct your business in such manner as would be customary after that period expired?     A. Exactly.

Q. And it is upon that assumption you made the answer you did to the effect this would cost about \$2,000.00 a month?     A. Yes, sir.

Mr. IVEY.—That is all.

Recross-examination.

(By Mr. HALVERSTADT.)

Q. What amount of advertising were you considering a month in dollars and cents in your \$2,000.00 expense?     A. A hundred and twenty-five dollars.

Mr. HALVERSTADT.—That is all.

(Witness excused.)

Court adjourned until Tuesday morning. [263]

**Testimony of W. J. H. Clark, for Defendant  
(Recalled).**

W. J. H. CLARK, recalled as a witness on behalf of the defendant, further testified as follows:

Direct Examination (Resumed).

(By Mr. IVEY.)

Q. Mr. Clark, have you with you now the records showing how many Reo automobiles you sold to your

(Testimony of W. J. H. Clark.)

different subagencies during the period between October, 1914, and July, 1915?     A. Yes.

Q. Will you produce those records?

A. They are in that case back of you tied up with string, Mr. Ivey.

Q. You needn't unwrap them until it becomes necessary for an inspection of them. Does that show the disposition, Mr. Clark, of the entire quantity of Reos that you got during that period?     A. Yes, sir.

Q. And is that the entire quantity of Reos that you were able to get from the factory during that period?     A. Yes, sir.

Q. What do you call those sheets that you have?

A. These are the sales order sheets.

Q. Well, tell us, Mr. Clark, what a sales order sheet is?

A. It's our original record, the Northwest Auto Company, of the sale of these machines to the various parties.

Q. Who makes out that sheet, you or the purchaser?

A. The most of these are made out by me and the others were made out by the bookkeeper, who was under my authority.

Q. And that is the original record that you keep of those [264] transactions?

A. Absolutely.

Mr. IVEY.—I believe, Mr. Halverstadt, you were willing the other day for Mr. Clark to tell how many of these Reos went to the successors of the Harmon Motor Car Company?

(Testimony of W. J. H. Clark.)

Mr. HALVERSTADT.—At this time I don't see the materiality of it. I call counsel's attention now to the provision of the contract that he has pleaded, as follows: "And the shipment of such Reo automobiles covered by this contract is to be made as above specified, subject to the prior orders of other dealers." Now, show by Mr. Clark what orders you had prior to October 17, 1914.

By Mr. IVEY.—(Q.) This shows all of the orders, does it not, Mr. Clark?

A. All of the orders, yes.

Mr. IVEY.—That is the whole thing right there. I can have Mr. Clark figure that out.

Mr. HALVERSTADT.—I would like to know how many orders they had received prior to the making of this contract.

By Mr. IVEY.—(Q.) Can you make—

A. This can be made from these without any difficulty.

By Mr. HALVERSTADT.—(Q.) Pick out the orders yourself?

A. Oh, yes.

By Mr. IVEY.—(Q.) When do those orders date from?

A. They date from the 7th day of August, 1914.

Q. 7th day of August, 1914. Would it take you very long, Mr. Clark, to tabulate that for us?

A. No, it wouldn't take more than fifteen or twenty minutes.

Q. Let's see what they look like (examining

(Testimony of W. J. H. Clark.)

same). Are they arranged in chronological order?  
[265]

A. Chronological order, yes. I will point out, Mr. Ivey—there is more than one machine on each order. In some cases there are four.

Q. How many altogether are there in here?

A. Altogether? Machines?

Q. Yes.

A. I think somewhere around about three hundred and seventy-five.

Q. Three hundred and seventy-five?

A. I think so; something like that.

Q. And how many did your contract from the factory call for? A. Four hundred and fifty.

The COURT.—He can tabulate that while we are transacting some other business.

The WITNESS.—I can tabulate it in fifteen or twenty minutes.

Mr. IVEY.—I offer this entire bunch of order sheets, your Honor, please, in evidence.

Mr. HALVERSTADT.—Now, we object to them, your Honor, because the only object there could be is to show, according to their contract, that at the time they made this contract with us there were so many prior orders which they had received that they couldn't fill them. The language is "subject to prior orders of other dealers." Now, only those orders which were received prior to that time are material or admissible. We object to the rest.

The COURT.—Those which are prior to this may be admitted.



(Testimony of W. J. H. Clark.)

Mr. IVEY.—Well, if your Honor please, my object, in addition to showing that phase of the matter, is to show all the orders we did get, and the dates on which we got those orders, and the dates on which we filled the same. [266] Now, the orders that were to come from the Harmon Motor Car Company, they were to be put in thirty days beforehand, and any order that we got, say, for instance, in March, 1915, certainly in February, 1915, would be material to show what disposition we were making of the machines that we were getting from the factory. Now, before making any further offer of this entire set of orders I will ask the witness if he has the contracts that he had with his different sub-agencies during that period for Reo machines?

A. Yes.

Q. Did you bring those contracts? A. Yes.

Mr. IVEY.—I withdraw the offer of these documents at this time for the purpose of examining the witness on those contracts.

Q. Will you produce all the other contracts you had, Mr. Clark, for the Reo machines?

A. (Witness produces papers.) They are in chronological order, too.

Q. How many are there, Mr. Clark?

A. There is probably forty or fifty, but not many of them prior to the date of the contract with the Harmon Motor Car Company.

Q. This bunch of contracts that you have here were all the contracts that you had during that period? A. Yes.

(Testimony of W. J. H. Clark.)

Q. This runs from August 7, 1914? A. Yes.

Q. To— A. July,— [267]

Q. All of them prior to July 31, 1915? A. Yes.

Mr. IVEY.—I offer this bunch of contracts in evidence.

Mr. HALVERSTADT.—We have no objection to so many of those contracts as were entered into prior to the date the contract in suit was entered into. All the others we object to as incompetent and irrelevant.

Mr. IVEY.—I think, your Honor, please, counsel is mistaking the term “prior orders” with “prior contracts.”

Mr. HALVERSTADT.—I have no objection to any of those contracts going in evidence which were executed prior to the contract in suit.

Mr. IVEY.—I am talking about prior orders and counsel is talking about prior contracts. Now, your Honor will recall that this contract provided that unless orders are put in for machines they don't have to be furnished. It isn't a question of whether we had contracts for the entire quantity of machines we were going to get from the factory. Every one of those contracts, certainly those contracts I have examined, and presumably these, too, provide that unless the agencies put in orders for machines we can dispose of them in some other kind of way. Now, I am going to show, your Honor, that we had orders for a great number more machines than we could get, and the outstanding contracts we had were for more machines than we could get from the

(Testimony of W. J. H. Clark.)

factory. That is the purpose of introducing all of these contracts.

The COURT.—I presume the Court would have to regulate the matter by instructions anyhow when you get all the evidence in and tell the jury what they can and cannot [268] consider in relation to those contracts, and I presume to get the view of both sides properly before the jury and the Court perhaps they may be filed.

Mr. HALVERSTADT.—We except to the ruling in so far as it admits any orders which are subsequent to the date of the execution of the contract in question.

The COURT.—Yes.

Mr. HALVERSTADT.—Any contracts, I mean, instead of orders.

Contracts referred to received in evidence, marked Defendant's Exhibit "C" and made a part of the record herein.

Mr. IVEY.—I now offer in evidence this entire lot of sales orders to show what we were able to do with this entire lot of contracts.

Mr. HALVERSTADT.—I make the same objection.

The COURT.—Be the same ruling, subject to the possible withdrawal of some of those contracts in consideration for the jury when finally submitted to them.

Mr. HALVERSTADT.—I save the same exception to the ruling of the Court.

The COURT.—Yes.

(Testimony of W. J. H. Clark.)

By Mr. IVEY.—(Q.) Do you know, Mr. Clark, how many automobiles were contracted to be sold by your company in all of those contracts; have you added them up?

A. No, sir, I have not, Mr. Ivey.

Q. I wish you would do that after you get off the stand.      A. I can do that, yes.

Q. And also tabulate this other matter for us.

A. Yes.

Mr. IVEY.—That is all, Mr. Clark.

Mr. HALVERSTADT.—Will you let him add that up and let me cross-examine [269] him all at once?

Mr. IVEY.—Yes.

(Witness excused.)

**Testimony of F. W. Vogler, for Defendant  
(Recalled).**

F. W. VOGLER, a witness for the defendant, recalled on behalf of the defendant, further testified as follows:

**Direct Examination.**

(By Mr. IVEY.)

Q. Mr. Vogler, the other day when you were on the stand I asked you if there were any additional conversations besides those that you mentioned that you had had with Mr. Harmon regarding the conduct of this business. At that time you didn't seem to recall any more. Do you now recall any more?

A. Why, yes, there were on several occasions.



(Testimony of F. W. Vogler.)

Mr. Harmon's conduct was not such that we desired of an agent.

Mr. HALVERSTADT.—What is that answer, please?

A. I said that his conduct was not such as we desired of a representative.

Mr. HALVERSTADT.—I move to strike that.

The COURT.—That will be stricken and the jury will disregard the answer. The question was, What was said?

By Mr. IVEY.—(Q.) State what it was he said and what occurred between the two of you. [270]

A. Oh. On one occasion during—

Mr. HALVERSTADT.—(Q.) When was that, before or subsequent to his severing his relations with the company?

A. It was in January, 1914, as I remember it, during an automobile show. Mr. Harmon appeared at the exhibition intoxicated. Any time he appeared there he was in an intoxicated condition. We remonstrated with him and asked him if he wouldn't keep away. It seems he didn't want to keep away, but kept around there. Some of us salesmen finally took him away. I had a talk with him at that time and told him that it was absolutely useless for us to continue on if his actions would continue in that way. And another case, one morning I came down from Spokane early in the morning—

Mr. HALVERSTADT.—(Q.) When was that?

A. That was in—either the latter part of September or first of October.

(Testimony of F. W. Vogler.)

By Mr. IVEY.—(Q.) Was it before or after the entering into this contract?

A. To my best ability it was after.

Q. After entering into the contract?

A. Yes. I came in there one morning and asked where Harmon was,—

Mr. HALVERSTADT.—(Q.) Did you state what time that was?

Mr. IVEY.—He said it was after the entering of the contract.

Mr. HALVERSTADT.—Was it before Mr. Harmon severed his relations with the company?

The COURT.—It was in October, he said.

Mr. HALVERSTADT.—Oh, I didn't understand him. October, 1914?

A. Yes. I seen where Mr. Harmon was, and the washer, or some [271] employee around there said—

Mr. HALVERSTADT.—Just a minute. That is hearsay. Object to it on that ground.

Mr. IVEY.—You were just asked to state what occurred as between you and Mr. Harmon, where you found him, if you found him, or what he said, if he said anything. You can't testify to what somebody told you except Mr. Harmon himself.

A. Just where he was?

Q. No, you can't testify to your making inquiries where he was.

A. I found him in the tonneau of the car with a couple of girls. I don't know the names of the girls, but he was in there.

(Testimony of F. W. Vogler.)

Q. Where was that?

A. That was in the garage or the warehouse of their—where they keep their cars, where they kept their cars covered over, some of them.

Q. What time of the day was that?

A. It was early in the morning.

Q. Well, did you have any conversation then with Mr. Harmon about that?

A. Not at that time; no.

Q. Well, what condition was Mr. Harmon and these two girls in?

A. Well, I wouldn't say that; I couldn't say that.

Q. You will have to speak louder.

A. I wouldn't say what condition he was in.

Q. You say you had no conversation with him at that time?      A. Not at that time.

Q. Well, did you have a conversation—

A. Later I simply brought those matters up to him. This was done time and again, and I told him that his actions would [272] have to improve.

Q. Well, did you speak to him at any time about this particular incident, finding him there with those two girls?

A. I don't know as I mentioned that particular instance to him. I didn't—

Q. Is there any other thing that you recall at this time that occurred between you and Mr. Harmon?

A. Why, I can't state just the particular time, but all during that contract I would have talks with Mr. Harmon and ask him why he carried on and didn't tend to his business in better shape than he did. He

(Testimony of F. W. Vogler.)

would promise me that he would try to do it. I said, "If you will do it we will continue it, but if you don't we will simply be compelled to get representation here. You are doing yourself no good, you are doing us no good and as a business proposition you can't put it over and continue with your present contract."

Q. Where was that show that you spoke of a while ago? A. I think it was in the armory.

Q. Armory? A. Yes.

Q. What kind of show was that?

A. It was an automobile show.

Q. Were the Reos being exhibited there?

A. Yes.

Mr. IVEY.—I think that's all.

Cross-examination.

(By Mr. HALVERSTADT.)

Q. Mr. Vogler, this automobile show was in January, 1914, was [273] it not?

A. No, it was—I am mistaken there. It was—

Q. All right. Now, tell us when it was.

A. As far as I can remember, it was the following year, 1915, as far as I remember.

Q. Now, you are perfectly sure that it was in the year 1915, January, are you, the early part of the year 1915?

A. As near as I can remember it at this time it was.

Q. Now, Mr. Vogler, don't you know there was no automobile show held here in the year 1915? Now, don't you know that to be the fact?



(Testimony of F. W. Vogler.)

A. No, I don't. My remembrance is that that was the year.

Q. All right then, we will put it this way: The occasion you spoke of was at an automobile show held here, was it not?

A. In that case where he was intoxicated during the whole show was, yes.

Q. And if there was no automobile show held here in 1915 then you are mistaken as to the occasion, are you not?

A. Well, as I said before, my remembrance is in 1915.

Q. Yes. Now, Mr. Vogler, let me ask you another thing. This I should have asked him the other day. May I ask him now?

Mr. IVEY.—Sure.

By Mr. HALVERSTADT.—(Q.) You spoke of a conversation you had with Mr. Harmon at the Washington hotel after he had severed his relations with the company. Now, at that time did you not tell him, in substance, this: That you thought it would be advisable if he would leave the business for a while, but that Mrs. Harmon might go ahead and conduct the business as theretofore? [274]

A. I don't know. No, I don't recall any such conversation.

Q. But would you swear positively that was not said by you, in substance?

A. I might have said, and I did say, that I felt very sorry for Mrs. Harmon, and had made a proposition to her that if she could reorganize her company and

(Testimony of F. W. Vogler.)

furnish the capital that we would consider it.

Q. You are talking now about what you said to Mrs. Harmon?

A. I am talking now about what I said to Mr. Harmon at that time. Mr. Harmon, as I said the other day, *through* up the sponge and said that he was ready to quit.

Q. Mr. Vogler, I believe you said the other day that you asked Mrs. Harmon if you might go down to the bank, and she said yes? A. Yes.

Q. And that you went down? A. Yes.

Q. Now, when you returned did you tell Mrs. Harmon what the bank officials had told you?

A. Yes, sir.

Q. What did you tell her?

A. I told her I went before the bank officials and laid the case before them, and asked them if there was any chance for them to help Mrs. Harmon out, and they said absolutely not. As I recall it, he claimed that they owed something at that time.

Q. Mr. Vogler, I call your attention to a number of letters here marked Plaintiff's Exhibit "14," and I will ask you whose signatures appear on all those letters? A. Mr. Clark. [275]

Q. And Mr. Clark, the gentleman who testified here, is the Secretary of the company? A. Yes.

Mr. HALVERSTADT.—We offer these in evidence as Plaintiff's Exhibit "14."

Mr. IVEY.—Object to them, your Honor, please, upon the ground that they are immaterial for the reason that these letters were written between May

(Testimony of F. W. Vogler.)

1st, 1914, and July 22, 1914, and the contract in question was entered into in October, 1914. That contract provides that all of the prior agreements made between the parties with reference to the Reo machine are incorporated in that contract itself. I haven't read these letters through.

The COURT.—What is the purpose of these letters?

Mr. HALVERSTADT.—You will recall that the testimony was, on behalf of the plaintiff, that the bank had made the same agreement for this year that had existed the prior year. These letters indicate what that agreement was and what the practice was in all regard during that year.

Mr. IVEY.—That is the plaintiff's testimony you are talking about now, isn't it?

Mr. HALVERSTADT.—Yes.

Mr. IVEY.—The plaintiff can prove that agreement anyway he wants to.

The COURT.—Sustained.

Mr. HALVERSTADT.—Exception. That is all.

Mr. IVEY.—That is all.

(Witness excused.) [276]

**Testimony of H. C. Harriss, for Defendant.**

H. C. HARRISS, produced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. IVEY.)

Q. Mr. Harris, give your full name, please.

(Testimony of H. C. Harriss.)

A. H. C. Harriss.

Q. What is your business, Mr. Harriss?

A. Salesman for the Reo Motor Car Company.

Q. How long have you been salesman?

A. Since about September, 1912.

Q. Been continuously with this company during that time?      A. Yes.

Q. You were with the company, then, in the season of 1914 and '15?      A. Yes.

Q. Were you at the factory any time during that season?

A. Yes, I was there during July, August and September, that is, till about the middle of September. Not continuously. I spent part of the time in Ohio, but I left the factory for the west about the middle of September, 1914, and returned there, I think in December, I think it was December, or early in January; I am not certain.

Q. Do you know what conditions prevailed around the factory at that time with reference to the manufacture of the Reo machines?

Mr. HALVERSTADT.—Now, what time?

Mr. IVEY.—During the season of 1914 and '15.

Mr. HALVERSTADT.—He testified, if I recollect, that he was at the factory during what months of 1915? [277]

Mr. IVEY.—'14, I think.

A. Well, he asked me about '14. The '14-'15 season—our season, by the way, starts on the 1st of August, that is, our contracts with our distributors



(Testimony of H. C. Harriss.)

are made on the 1st of August of each year; or fiscal year starts then.

Q. Well then, you can answer that question as to whether or not you were familiar with the conditions there governing the manufacture of the Reo machines during that time generally.

Mr. HALVERSTADT.—That is incompetent, irrelevant and immaterial under the amended pleading.

The COURT.—He may answer.

Mr. IVEY.—I withdraw the question and ask you this question:

Q. Do you know whether or not the factory, during that season, turned out as many cars as they had contracted to turn out?

Mr. HALVERSTADT.—We object to that. That is incompetent, irrelevant and immaterial, and is not included within the exception.

Mr. IVEY.—Well, I am laying a foundation, your Honor, please, and am going to ask him why.

The COURT.—He may answer.

A. The factory have never filled their contracts; they never have built as many cars as they have contracted for.

The COURT.—Confine your answer to the year he is inquiring about.

A. Well, during 1914-'15 season the factory did not build as many machines as they contracted to sell.

By Mr. IVEY.—(Q.) Do you know why they didn't?

A. Well, they closed their factory in July, about

(Testimony of H. C. Harriss.)

the 1st of [278] July, for inventory.

Q. For what?

A. Inventory. They take inventory, and also make repairs on the machinery, and it was their intention to start building on the 1st of September. And later they announced that they would—

Mr. HALVERSTADT.—We object to that; that is hearsay.

Mr. IVEY.—You can't say what they announced, but just say why they didn't manufacture them.

A. Well, they did not have the material at that time. This was a statement made to me by Mr. Scott.

Mr. HALVERSTADT.—Now, we object to that as pure hearsay and move to strike the testimony.

The COURT.—It is stricken.

Mr. IVEY.—You can't make a statement as to what somebody told you, but you have to state the facts as they were. What was the reason?

Mr. HALVERSTADT.—If you know.

A. They were making changes at that time in the model of the car, building a new six-cylinder car, and also changing the four-cylinder car, and the details that always come up on account of changes was responsible chiefly for the delay in manufacturing.

By Mr. IVEY.—(Q.) Now, you spoke of being a little short of some materials. Why didn't they order the materials?

Mr. HALVERSTADT.—(Q.) Now, do you know of your own personal knowledge that they didn't order material?

(Testimony of H. C. Harriss.)

A. I know of my own personal knowledge that they did not have the materials.

By Mr. IVEY.—(Q.) Do you know why they didn't proceed to use [279] more efforts to get them than they did?

Mr. HALVERSTADT.—Now, that will not excuse them under the exception. Object to it as incompetent, irrelevant and immaterial.

Mr. IVEY.—I withdraw the question.

Q. Do you know of any other reasons than those that you have stated as to why they weren't able to fill the orders? A. No, I do not.

Mr. IVEY.—That is all.

Mr. HALVERSTADT.—No cross-examination.

(Witness excused.)

Mr. IVEY.—I think you may now cross-examine Mr. Clark, Mr. Halverstadt.

Mr. HALVERSTADT.—If the Court please, at this time I want to move to strike all the testimony of this last witness in so far as it was sought thereby to prove the affirmative defense which was permitted to be made during the trial, on the ground that it is incompetent, irrelevant and immaterial, and is not included within the exception of the contract. Now, if the factory didn't order their material, that is not mentioned here; if the factory changed their model and laid down on the job, that is not mentioned here; if the factory took an inventory and killed time, that is not mentioned here; that is not one of the things that is mentioned. The contract is "delays due to strikes, floods, accidents, or any

(Testimony of H. C. Harriss.)

other causes [280] beyond the control of the manufacturer or seller." Now, purely those certainly were within its control. The next of it is "whether occurring in the plant of the manufacturer, or in that of any concern from which the manufacturer or seller purchases parts or equipments." There is no offer of any testimony on the last. "And the shipment," and so on, "is subject to prior orders." Now, we move to strike out all of the testimony as incompetent, irrelevant and immaterial, and tending to prove no issue whatever in this case.

(Argument.)

The COURT.—I think the testimony may stand. Some of it may not all be material, but I can't take it all from the jury. The motion is denied.

Mr. HALVERSTADT.—Exception.

**Testimony of W. J. H. Clark, for Defendant  
(Recalled).**

W. J. H. CLARK, a witness for the defendant, recalled for cross-examination further testified as follows:

Cross-examination.

(By Mr. HALVERSTADT.)

Q. Mr. Clark will you produce the agency contracts which were entered into prior to October 17, 1914, that is, this Harmon Motor Car Company contract? A. To October 17th?

Q. Yes. Produce all the prior agency contracts; produce all the agency contracts which were prior



(Testimony of W. J. H. Clark.)

to that, even if [281] executed on the same date, but earlier. (Witness produces papers.) Now, those are the contracts that you handed me?

A. Those are prior to October.

Q. Now, the first is the contract between Northwest Auto Company and Neuman Brothers?

A. Yes, sir.

Q. Dated August 7, 1914? A. Yes.

Q. The next is the contract between Northwest Auto Company and Rowan Auto Company, dated September 4, 1914? A. Yes.

Q. The next is the contract between Northwest Auto Company and Bell-Wyman Employment Company, dated September 5, 1914. And the last one is Northwest Auto Company to Fifth Avenue Auto Supply Company, dated October 15, 1914?

A. Yes, sir.

Q. Now, these four contracts which I have just mentioned are the only contracts which were entered into prior to the Harmon Motor Car Company contract in suit? A. Yes.

Mr. HALVERSTADT.—I offer these in evidence.

Mr. IVEY.—They already have been introduced.

Mr. HALVERSTADT.—All right.

Q. Now, Mr. Clark, produce what you call orders as distinguished from contracts which were prior in point of time to this contract in suit.

A. Prior to—

Q. October 17th. A. Yes, sir.

Q. Pick out each particular one. [282]

A. Surely. That was October 17th, wasn't it?

(Testimony of W. J. H. Clark.)

Q. October 17th.

A. I think that's all—yes. (Witness produces papers.)

Q. Now, this first was dated August 7, 1914, and was for one car, was it not?     A. One car, yes.

Q. And the next one was dated August 7, 1914, for one car?     A. Yeh.

Q. The next is August 13th.

A. For one car.

Q. For one car. The next is August 18th for four cars?     A. Yeh.

Q. The next is August 26th for four cars?

A. Yes, sir.

Q. The next is August 29th for one car?

A. Yes, sir.

Q. The next is September 25th for—

A. Four cars.

Q. Four cars. The next is September 12th for two cars, correct?     A. One car.

Q. For one car. Next is September 14th for one car?     A. Yes, sir.

Q. Next is September 16th for four cars?

A. Yes, sir.

Q. Next is September 16th for—     A. One car.

Q. For one car. Next is September 15th for one car?     A. Yeh.

Q. Next is September 28th for one car? [283]

A. Yeh.

Q. Next is September 28th for one car?

A. Yeh.

Q. Next October 1st, one car?     A. Yeh.

(Testimony of W. J. H. Clark.)

Q. Next October 8th, one car?     A. Yeh.

Q. Those are all?     A. Those are all.

Q. Now, outside of those contracts which you have specified and these orders which you have just specified your other contracts and your other orders were taken subsequent to the Harmon Motor Car Company contract which is in suit here?     A. Yes, sir.

Mr. HALVERSTADT.—That is all.

Mr. IVEY.—You have no further examination?

Mr. HALVERSTADT.—No.     Just wait a minute.  
Oh yes, one thing else.

Q. How many automobiles did the factory deliver to the Northwest Auto Company between October 17, 1914, and July 31, 1915?     A. Between when?

Q. October 17, 1914, and July 31, 1915, the date of the life of the Harmon contract.     How many?

A. About three hundred and fifty.

Mr. HALVERSTADT.—That is all.

By Mr. IVEY.—(Q.) How many did you say you had contracted for?     A. Four hundred and fifty.

Mr. IVEY.—That is all.

(Witness excused.)     [284]

**Testimony of F. E. Harmon, for Defendant.**

F. E. HARMON, a witness for the plaintiff, recalled on behalf of the defendant, further testified as follows:

**Direct Examination.**

(By Mr. IVEY.)

Q. Mr. Harmon, did you file an income tax report for the year 1914?     A. In the year 1914?

(Testimony of F. E. Harmon.)

Q. Yes.      A. I think we did.

Q. Do you know whether you did or not?

A. I am pretty sure we did.

Q. Will you say positively whether you did or not?

A. If I remember correctly, when that matter came up I simply turned that thing over to my attorney, if I remember correctly.

Q. Who was your attorney at that time?

A. Dan Landon.

Q. You don't know whether you filed one or not, then?      A. I hardly think I did.

Q. You say you think you did?

A. I hardly think I did.

Q. You mean you did not, then?

A. I hardly think I made it up myself.

Q. You know what you mean by filing?

A. Yes, I know what you mean.

Q. You swear to the income you made during the past year, and that, then, is filed in the proper office?

A. I think that I did.

Q. You filed it in the office of the Internal Revenue?      [285]

A. I think Mr. Landon did.

Q. What does that show for that year?

A. The figures I don't remember.

Q. Where did you get your data from to make that up?      A. From my books, I presume.

Q. Got it where?      A. From my books.

Q. From your books. These same books that we have here?      A. No. You say in 1914?

Q. Yes.



(Testimony of F. E. Harmon.)

A. Yes, from those books there in 1914, from part of them. What month is that filed?

Q. To be filed March, 1915.

A. To be filed March, 1915?

Q. Be filed prior to March, 1915.

A. Then I didn't file.

Q. You did not? A. No, I did not.

Q. Did the Harmon Motor Car Company file one?

A. They did not.

Q. Did Mrs. Harmon file one?

A. She did not.

Q. Did you ever file one in your life?

A. Yes, sir.

Q. When? A. 1914, I think.

Q. In the year 1914? A. Yes, sir.

Q. That was for the business of 1913?

A. I think so. [286]

Q. You know what return you made?

A. I do not.

Q. Do you know where you got your data to make it up? A. Do I know which?

Q. Where you got your data to make it up?

A. I don't know as I have, no.

Mr. IVEY.—That's all.

Cross-examination.

(By Mr. HALVERSTADT.)

Q. Mr. Harmon, will you state to the jury—now, this is merely preliminary, Mr. Ivey—what two makes of cars were principally sold prior to selling the Reo?

(Testimony of F. E. Harmon.)

Mr. IVEY.—Object to that as not proper cross-examination.

Mr. HALVERSTADT.—It is merely preliminary to answer question.

The COURT.—I didn't get the question. (Question repeated.)

Mr. HALVERSTADT.—It is merely preliminary to another question that will follow.

Mr. IVEY.—I withdraw that objection, because Mr. Halverstadt can put him on the stand anyway if he wanted to.

The COURT.—All right.

A. Not any two makes, Mr. Halverstadt, only one make, and that is the Interstate. I took the Lozier and Reo at the same time.

Q. Now, what happened, if you know, to the factory of the Interstate?

A. They failed along in July, 1915, or 1913.

Q. Did it leave the Harmon Motor Car Company with any cars on its hand?

A. It left us with about twenty-three cars on hand.

[287]

Q. What happened by that failure to the retail sale value of those cars?

Mr. IVEY.—Object to that, your Honor, please, as calling for a conclusion.

Mr. HALVERSTADT.—I withdraw it.

Q. After that failure could you sell those cars for as much as before?

A. We sold them for about fifty per cent of what we did before.

(Testimony of F. E. Harmon.)

Q. And is that the most you could get for them?

A. Yes, sir.

Q. Why?

A. On account at that time everybody was under the impression they wouldn't be able to get parts and service; and the agency, of course, with the factory out of business the agency would naturally be discontinued.

Q. What was the sale price of those Interstate per car?

A. From twenty-four hundred to thirty-four hundred.

Mr. IVEY.—Your Honor please, I object to that. They are going now entirely without the issues.

The COURT.—I think so.

Mr. HALVERSTADT.—May I put one other question merely for the record?

The COURT.—Very well.

By Mr. HALVERSTADT.—(Q.) What amount in money did the Harmon Motor Car Company lose as a result of the failure of that company?

Mr. IVEY.—I object to that.

The COURT.—Sustained.

Mr. HALVERSTADT.—Exception. That is all.  
(Witness excused.) [288]

**Testimony of F. W. Vogler, for Defendant  
(Recalled).**

F. W. VOGLER, a witness for the defendant, recalled by the defendant, further testified as follows:

**Direct Examination.**

(By Mr. IVEY.)

Q. Mr. Vogler, referring to that show that you thought was in 1915, after refreshing your recollection what do you think about it now?

A. Why, after thinking it over and calling up—

Q. Speak louder, please.

A. After thinking it over and calling up some information, why, I wouldn't say positively it was 1915. I have so many things to think about I sometimes get these things mixed up; but it might have been in 1914.

Mr. IVEY.—That is all.

**Cross-examination.**

(By Mr. HALVERSTADT.)

Q. You are inclined to think it was, are you not, in 1914?

A. I called up two different parties this morning, since I testified, and one said 1915 and the other said 1914.

Q. Mr. Vogler, here is one question I can ask now. Mr. Sands, or his company, is the agent for the Marmon car here, isn't he?

A. Yes, he is the agent.

Q. Now, under whom does he work, Northwest Auto Company, your company?      A. No, sir.



(Testimony of F. W. Vogler.)

Q. He does not?     A. He does not. [289]

Q. You are also the agent for the Marmon car, are you not, Northwest Auto Company?

A. We are distributors; yes.

Q. And Mr. Sands gets his cars through you?

A. No, sir, unless we feel like giving them to him. Absolutely a separate contract.

Q. Didn't Mr. Sands get a carload of Marmons from you last week?

A. I think he got two or three we let him have for accommodation, as we let any distributor have.

Mr. HALVERSTADT.—That is all.

Mr. IVEY.—That is all.

(Witness excused.)

Mr. IVEY.—If your Honor please, with the exception *one* one witness who is not here yet we are through.

Mr. HALVERSTADT.—If counsel desires I will go ahead with the rebuttal until his witness comes.

Mr. IVEY.—I will appreciate it if you will. [290]

**Testimony of Miss Helene H. Wilson, for Plaintiff  
(In Rebuttal).**

Miss HELENE H. WILSON, produced in rebuttal as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALVERSTADT.)

Q. Please state your name.

A. Helene H. Wilson.

Q. What is your business, Miss Wilson?

(Testimony of Miss Helene H. Wilson.)

A. Assistant secretary of the automobile club of Seattle.

Q. How long have you held that position?

A. Since the 29th day of December, 1914.

Q. Now, then, do or do not your duties require you to keep track of automobile shows?

A. That is part of the duties of the club.

Q. Do you know of your own knowledge—answer yes or no—whether there was an automobile show in the city of Seattle in the year 1915?

A. There was not.

Q. There was not?      A. No.

Mr. HALVERSTADT.—Cross-examine.

Mr. IVEY.—No cross-examination. I think Mr. Vogler was mistaken, that is all.

(Witness excused.) [291]

**Testimony of J. M. Thornton, for Plaintiff,  
(Recalled in Rebuttal).**

J. M. THORNTON, a witness for the plaintiff, recalled in rebuttal on behalf of the plaintiff, further testified as follows:

**Direct Examination.**

(By Mr. HALVERSTADT.)

Q. Mr. Thornton, on Friday Mr. Vogler, as I recollect—correct me if that is not true—testified that at the time he was here in Seattle along the first of February, 1915, the relations between yourself and Mrs. Harmon were not harmonious. State to the jury whether or not your relations were or were not harmonious.

(Testimony of J. M. Thornton.)

A. Why, our relations were very pleasant, as I recollect, absolutely.

Q. Was there any trouble between you?

A. Not at all.

Mr. HALVERSTADT.—That is all.

Cross-examination.

(By Mr. IVEY.)

Q. Mr. Halverstadt, I think it was a little later than the 1st of February. What were your relations a little later on in February and up to the 22d, with Mrs. Harmon?

A. I was still around the company.

Q. How is that?

A. I was still connected with the company.

Q. But were your relations with Mrs. Harmon smooth during that entire period?

A. Why, I never had any argument at all with Mrs. Harmon at all.

Q. Didn't have any conversation with Mr. Vogler about your [292] relations not being smooth, did you?

A. As far as Mrs. Harmon was concerned our relations was all right. It was only a matter of business, the same as it was with Mr. Vogler, or anybody else. I spoke to him about business relations. As far as my relations with Mrs. Harmon, they were absolutely pleasant.

Mr. IVEY.—That is all.

Redirect Examination.

(By Mr. HALVERSTADT.)

Q. Was there an automobile show held in the city

(Testimony of J. M. Thornton.)

of Seattle in the year 1915?

A. No, there was not.

Q. When was the last one prior to the year 1915 that was held?

A. There was one in '14.

Q. What month, if you remember?

A. That was in February.

Q. February, 1914? A. Yes, sir.

Mr. HALVERSTADT.—That is all.

Mr. IVEY.—That is all.

(Witness excused.) [293]

**Testimony of F. E. Harmon, for Plaintiff (Recalled in Rebuttal).**

F. E. HARMON, a witness for the plaintiff, recalled in rebuttal as a witness on behalf of the plaintiff, further testified, as follows:

**Direct Examination.**

(By Mr. HALVERSTADT.)

Q. Mr. Harmon, at the time Mr. Vogler was here during the early part of February, 1915, I believe he testified that he saw you or that you saw him at the Washington Hotel in the city? A. Yes, sir.

Q. That is a fact, is it? A. Yes, sir.

Q. Now, then, state to the jury what, if anything, was said by him as to permitting Mrs. Harmon to keep this contract and carry on the business, and your connection with it, just whatever it was.

Mr. IVEY.—I object to that, your Honor please. This contract is in writing, and Mr. Vogler has already testified that he would have been willing to let



(Testimony of F. E. Harmon.)

Mrs. Harmon run this business, provided she would raise sufficient money. Now, if the testimony of this witness is being brought out for the purpose of showing that there was an actual assignment consented to by Mr. Vogler, I say to your Honor that should have been in writing. There is of record here some kind of an assignment by this witness to the plaintiff in this case of his interest in the business, but I think that inasmuch as the contract itself was in writing, and is of a personal nature, and cannot be assigned without the consent of the Northwest Auto Company, that no oral consent should be permitted [294] at this time. There has been a lot of conversations testified to here and a lot of telegrams, in fact. I will call your Honor's attention to that telegram of February 24th that was sent by Mrs. Harmon to Mr. Vogler, in which she said that she would like to run this business and wanted to know if Mr. Vogler wouldn't wait for a short time to see if she couldn't get sufficient capital together. Here it is. It is in the light of this telegram, your Honor please, that I don't think that any oral testimony should be admitted.

The COURT.—He may answer.

Mr. HALVERSTADT.—Read the question, please.

Q. (Question repeated.)

A. Why, I talked the matter over in general with Mr. Vogler.

Q. State, first, what he said with reference to your connection with it at the Washington hotel.

(Testimony of F. E. Harmon.)

Mr. IVEY.—When was that conversation, Mr. Halverstadt?

Mr. HALVERSTADT.—At the time he was here on this first trip in February, 1915.

Mr. IVEY.—Was that after February 5th?

By Mr. HALVERSTADT.—(Q.) Can you fix the date?

A. Not positively. I think it was on Wednesday. That Wednesday would be about the 3d.

Q. About the 3d? Go ahead. State, first, what he said with reference to your connection.

A. I can't fix the date definitely, but between the 1st and 3d.

Q. That approximately correct?

A. Yes. And I asked him what his ideas were in the matter, and everything like that, and he said that he thought [295] it would be advisable for me to be away from the business for a while. "Well," I said, "If I assign all of my interest and everything to Mrs. Harmon you would have no objection to her continuing the agency?" and he said, "No, absolutely not." The things would remain and the same arrangements would be continued as heretofore.

Mr. HALVERSTADT.—Cross-examine.

Cross-examination.

(By Mr. IVEY.)

Q. You say that was on the 3d?

A. I say it was near there at that time. I wouldn't fix the date exactly. It was within a few days, two or three, of that date, yes.

Q. You wired Mr. Vogler on the 2d, didn't you?

(Testimony of F. E. Harmon.)

A. I think so.

Q. I think that telegram so shows?

A. Yes, probably so.

Q. Mr. Vogler came up here on the 3d, didn't he?

A. I can't say the exact date.

Q. Certainly not earlier than the 3d. How long were you confined in jail before you saw Mr. Vogler after you sent him that telegram?

A. Only one day. I was released the next day.

Q. You were released the next day. That is on the 3d?

A. If I could look up the dates—I was arrested on Saturday night and released on Tuesday afternoon.

Q. Arrested on Saturday night and released on Tuesday afternoon? A. Yes. [296]

Q. Now, you sent Mr. Vogler this telegram on the very night you were arrested, did you?

A. I did not, no.

Q. You sent it later on? A. Yes, sir.

Q. You don't know what day of the week, I mean what day of the month Saturday was?

A. If I could look up the date I think I could almost fix the date, if I could see a calendar.

Q. You are sure you were arrested on a Saturday night?

A. Yes, sir, the 30th of January.

Q. 30th of January? A. Yes, sir.

Q. You are absolutely sure of that?

A. Absolutely.

Q. That was in 1915, was it?

A. Yes, sir.

(Testimony of F. E. Harmon.)

Mr. IVEY.—No further examination.

Redirect Examination.

(By Mr. HALVERSTADT.)

Q. Mr. Harmon, who was the surety on your bond by which you secured the release?

A. Mike Cohan and W. L. Collier, cashier of the Northern Bank.

Q. Cashier of the Northern Bank?

A. Yes, sir.

Q. Had you been acquainted with him theretofore? A. Collier?

Q. Yes.

A. Why, I done business with him for several years at the [297] bank, yes.

Q. And he was the man with whom this arrangement was made for the lifting of drafts?

A. Yes, sir.

Mr. HALVERSTADT.—That is all.

Recross-examination.

(By Mr. IVEY.)

Q. That is the same bank that went into the hands of a receiver here some time ago? A. It is.

Q. The same Collier who went to Walla Walla?

A. It is.

Mr. IVEY.—That is all.

(Witness excused.) [298]



**Testimony of Mrs. Gertrude Harmon, for Plaintiff  
(Recalled in Rebuttal).**

Mrs. GERTRUDE HARMON, the plaintiff, recalled in rebuttal as a witness on her own behalf, further testified as follows:

Direct Examination.

(By Mr. HALVERSTADT.)

Q. Mrs. Harmon, when Mr. Vogler was here during the first part of 1915, that first occasion when he was here, did you see him subsequent to that and prior to the time of the cancellation of the contract?

A. I don't recall seeing Mr. Vogler between around the first week of February and after the cancellation.

Q. Now, when he was here at that time what did he say with reference to permitting you to continue the business?

Mr. IVEY.—Just a minute. What particular time was that? A. The first time.

Mr. HALVERSTADT.—The first time when he was here. She testified she saw him only the first time he was here.

The WITNESS.—The first week in February.

By Mr. IVEY.—(Q.) The first week in February?

A. Yes, sir. Mr. Vogler asked me whether I thought I was capable of going ahead with the business, and I told him I was, because I had been there from the very beginning and grown up with it, and knew all the details of it, and I told him I knew I could go ahead with the operation. And he asked me

(Testimony of Mrs. Gertrude Harmon.)

how the bank would treat me, and had been treating me, and I told him they had treated me nice and were going to continue the same arrangements with me as when Mr. Harmon was in the business.

By Mr. HALVERSTADT.—(Q.) Mrs. Harmon, I call your attention to a number of letters which are marked Plaintiff's [299] Exhibit "14," which were offered some time ago. I ask you whether those are letters which were received by the Harmon Motor Car Company?

Mr. IVEY.—That is the same bunch we had this morning?

Mr. HALVERSTADT.—Yes.

A. Those are letters from the Harmon Motor Car Company to the Northwest Auto Company.

Q. During the preceding year how had bills of lading been taken care of, drafts which came in with bills of lading?

A. The Northern Bank & Trust Company, same as we take care of them ourselves.

Q. Was that arrangement in force in 1915?

A. That arrangement was in force in 1915. The Northern Bank & Trust Company lifted a carload of cars for me on the 19th of February, after Mr. Harmon was out of the business, and about two days before Mr. Vogler cancelled the contract.

Q. And whose draft was on that carload; who drew that draft? A. Northwest Auto Company.

Q. The defendant in this case? A. Yes.

Mr. HALVERSTADT.—Now, I reoffer these letters showing that the Northwest Auto Company here

(Testimony of Mrs. Gertrude Harmon.)

has on a number of occasions stated that they would draw through the Northern Bank & Trust Company as arranged. Now, it certainly is competent testimony to prove that prior arrangement and show the course of dealing.

The COURT.—Hasn't the witness already testified that?

Mr. HALVERSTADT.—It is cumulative testimony; it is testimony the defendant can't dispute. They are their own letters. [300]

The COURT.—The objection is sustained.

Mr. HALVERSTADT.—Exception.

The COURT.—The witness having already testified to those facts.

By Mr. HALVERSTADT.—(Q.) Mrs. Harmon, calling your attention to this telegram of February 24, 1915, which reads as follows: "Seattle, Wash., 24th. Mr. Fred Vogler, Care of Northwest Auto Company, Portland, Oregon. Am making arrangements with man of considerable means to go into partnership with me and put new money in the firm. Will change firm name and reorganize and carry on the business in a way that can't help but satisfy you. Do not make definite arrangements with anyone else until you hear my proposition. Can you come to Seattle? Also answer. Gertrude Harmon,"—a telegram which is admitted in evidence as Defendant's Exhibit "A." State to the jury how you came to send that telegram?

A. Well, when I got the letter cancelling my contract I went through my brain to think of every rea-

(Testimony of Mrs. Gertrude Harmon.)

son on earth to think why Mr. Vogler would cancel my contract, whether they seemed reasonable to me or not; and I wrote him a telegram, too, immediately to keep him from signing up anybody else until I could see him again.

Q. Now, how did you come to mention that change of name?

A. Mr. Vogler had spoken about a change of name. He never put it up to me as an ultimatum, but I wanted him to know that if he wanted me to do it I would do it.

Q. How did you come to mention putting new money in the business?

A. Because there wasn't anything else on earth that Mr. Vogler could think of. I had sold all the cars that I [301] had had delivered to me; there was nothing else I could think of. I thought of everything on earth I could think of to put into that telegram to stay Mr. Vogler from signing up a contract with anyone else and assigning my agency.

Q. Did you have before you at the time you sent that telegram this letter of February 22d cancelling the contract?     A. Yes, I did.

Q. Mrs. Harmon, have you and Mr. Harmon had any business dealings of any kind since he severed his connection with the company in the early part of February, 1915?

A. I have been working as a stenographer—

Q. Answer the question.

A. I have had no business relations, or any other kind of relations, with Mr. Harmon since that time.



(Testimony of Mrs. Gertrude Harmon.)

Q. Have you been living together?

A. No, sir, I have not.

Mr. HALVERSTADT.—That is all.

Cross-examination.

(By Mr. IVEY.)

Q. Mrs. Harmon, at the time that instrument bearing date February 5, 1915, signed by Mr. Harmon, called Plaintiff's Exhibit "1," at the time that was executed and delivered to you did you pay Mr. Harmon anything for it?

A. For what, the contract? Is that what you have?

Q. This purported assignment, the one we have been calling an assignment?

A. No, I didn't pay him anything.

Q. Well, how long had you been married before February 5, 1915? [302]

A. About four years and a half.

Q. How much money did you have at the time you got married? A. About twenty thousand dollars.

Q. What became of it?

A. All went into the business.

Q. And lost in the business, too, wasn't it?

A. Yes.

Q. It was lost between the years—during that four years you lost that twenty thousand dollars?

A. Partly through my Interstate contract, and partly through the Lozier. And then on top of that, the time I had a chance to get it back, why, I had that chance taken away from me, too.

Q. Now, you admit, Mrs. Harmon, that when Mr.

(Testimony of Mrs. Gertrude Harmon.)

Vogler was talking to you about your continuing the business that he did insist that before he would consent to that that you would have to get some one to finance you, do you not?

A. No, sir, I do not admit that. Mr. Vogler didn't put any ultimatum of that kind up to me, Mr. Ivey.

Q. There was a conversation about that, was there not?

A. The only conversation Mr. Vogler had with me about money was to ask me how the bank was going to handle the matter.

Q. Will you swear positively that he didn't tell you that unless you could make arrangements for some one to finance you or put some money into the business that he could not consent for you to undertake to run the business?

A. I can swear positively that Mr. Vogler did not say that to me.

Q. Well, what was your explanation for your having put in your telegram of the 24th that you were making arrangements [303] with man of considerable means to go into partnership with you and put new money in the firm? Why did you want him to know you were going to put new money in the firm?

A. When I got the letter of cancellation I got after Mr. Harmon, he was in Bellingham—

Q. You can't testify to what you told him.

A. You asked me why I put that in the telegram.

Q. Yes, but you can't repeat a conversation you had with Mr. Harmon.

(Testimony of Mrs. Gertrude Harmon.)

A. Well, how can I tell you how I came to put that in the telegram?

Q. If that is your reason you didn't have any reason so far as the case is concerned. But you did send this telegram, there is no question about that?

A. Yes, sir, I sent the telegram.

Q. I don't remember whether I asked you the other day, there was something said by Mr. Halverstadt about your having signed up papers for divorce. That was not ever carried on out, was it?

A. No, I never did obtain a divorce from Mr. Harmon.

Q. Now, you signed up those papers shortly after this trouble arose, along in the spring—

A. You mean when I signed up the divorce papers?

Q. Yes.

A. At the same time the trouble arose I signed up the divorce papers.

Q. And then subsequently abandoned the divorce?

A. Yes.

Mr. IVEY.—I think that is all. [304]

Redirect Examination.

(By Mr. HALVERSTADT.)

Q. Mrs. Harmon, Mr. Ivey brought out you had put about twenty thousand dollars in this business. Then you said it was lost. Tell the jury how it was lost, what occasioned the loss.

Mr. IVEY.—I think that is immaterial, if your Honor please. The witness, I think, probably has gone into that sufficiently. She said it was lost in the business.

(Testimony of Mrs. Gertrude Harmon.)

Mr. HALVERSTADT.—She didn't answer how it was lost. I have a right to show what caused that money to be lost.

The COURT.—Proceed.

By Mr. HALVERSTADT.—(Q.) How was that money lost?

The COURT.—How it was lost, and how much was lost in the business, if any.

Mr. HALVERSTADT.—All right; how much of it was lost in the business?

A. The Interstate factory failure I think would have lost us about fifteen thousand dollars at least.

Q. And how much did the failure of the Lozier factory lose you?

A. Well, the Lozier factory—I don't know exactly. I wouldn't be positive what the Lozier failure did lose us, but it lost us up into thousands of dollars; maybe three or four thousand.

Q. Maybe how much?

A. Maybe three or four thousand dollars; but I wouldn't be positive.

Q. And despite that loss you had built this business up?

A. Yes, we had. We had seven months prior to the cancellation [305] of my contract—

Mr. IVEY.—Object to that, your Honor please, as calling for a conclusion.

Mr. HALVERSTADT.—All right; withdraw that.

Q. Now, Mrs. Harmon, what months of this contract are profitable and what are unprofitable months in the automobile business?



(Testimony of Mrs. Gertrude Harmon.)

Mr. IVEY.—I think that was gone over fully in the case in chief.

The COURT.—Sustained. That is not a matter of rebuttal, I don't think. It is already covered.

Mr. HALVERSTADT.—That's all.

Mr. IVEY.—That's all, Mrs. Harmon.

(Witness excused.)

Mr. HALVERSTADT.—There is just one thing else I would like to introduce. Mr. Clark, take the stand again, if you will.

**Testimony of W. H. Clark, for Plaintiff (Recalled in Rebuttal).**

W. H. CLARK, a witness for the defendant, recalled in rebuttal on behalf of the plaintiff, further testified as follows:

Direct Examination.

(By Mr. HALVERSTADT.)

Q. Calling your attention, Mr. Clark, to an instrument which is marked Plaintiff's Exhibit "15," I will ask you whose signature that is?

A. That is my signature.

Q. That is your signature? A. Yes. [306]

Q. And the note you refer to in there is the one which is mentioned in the typewriting attached to the contract, is it not? A. Yes.

Mr. HALVERSTADT.—Offer the letter in evidence.

Mr. IVEY.—No objection to that.

The COURT.—Admitted.

Letter referred to received in evidence, marked

(Testimony of W. H. Clark.)

Plaintiff's Exhibit "15" and made a part of the record herein.

Mr. HALVERSTADT.—That is all.

Mr. IVEY.—No cross-examination.

(Witness excused.)

Mr. HALVERSTADT.—Plaintiff rests.

Mr. IVEY.—If your Honor please, no progress has been made in that matter. I would like to be permitted to speak with Mr. Vogler about it for a minute and it may be we will rest.

(Mr. Ivey, Mr. Clark and Mr. Vogler confer.)

Mr. IVEY.—If your Honor please, the defendant rests.

ARGUMENT TO THE JURY BY RESPECTIVE COUNSEL.

COURT ADJOURNED UNTIL 2 P. M. [307]

### **Instructions of the Court.**

Gentlemen of the jury: You have listened to all of the testimony which has been presented in this case on the part of the plaintiff and on the part of the defendant. It is for you to determine what the facts in the case are bearing upon the issues as presented.

The issue in this case is made by the complaint of the plaintiff, who charges that on the 17th day of October, 1914, the Harmon Motor Car Company entered into a contract with the defendant whereby the defendant agreed to furnish to the Harmon Motor Car Company certain automobiles during a specified period of time; and that the defendant failed to do that and cancelled the contract prior to its termina-

tion by its terms, and the plaintiff, the Harmon Motor Car Company, was damaged by that. Then sets out the fact she succeeded to the interests of the Harmon Motor Car Company and has a right, by reason of that, to prosecute this action.

The defendant Motor Car Company admits that the contract was entered into. It likewise admits that it was a corporation, as charged in the complaint. It denies practically all of the other allegations of the complaint; denies that motor cars had been sold; denies that the plaintiff was damaged, or the Harmon Motor Car Company was damaged; and denies likewise that the Harmon Motor Car Company was damaged in any sum whatever on account of any conduct on the part of the defendant. [308]

And it further sets up as an affirmative defense the fact that it entered into a contract, and that by reason of the terms of the contract it was entitled to reapportion the territory during any time of the period of the contract that it saw fit that had been given to the Harmon Motor Car Company, and that it did, in the month of January, 1915, because of certain conduct, which is set out here, on the part of the President of the Harmon Motor Car Company, deemed it wise to cancel the contract, and did, pursuant to the authority given under the terms of the provisions to which I have referred, terminated the contract.

And it further alleges as a further affirmative defense that there was a condition attached to the contract which was entered into which required \$—— to be paid in thirty days, and unless that was promptly paid on the date it was due that the con-

tract would be ended, in default. And that the note was not paid within thirty days, or at all, and that on the 27th of February, a considerable part being *lost* past due, it did serve on the Harmon Motor Car Company the notice required and terminated the contract after the expiration of ten days, and entered into a new contract with another concern in the City of Seattle for the sale and distribution of the car.

The plaintiff files a reply to the affirmative matter and denies all of the allegations set up in the affirmative matter of the answer.

It is for you to determine in this case what the facts in the case are. You will determine that from [309] all of the evidence which has been offered and admitted.

You, gentlemen of the jury, are the sole judges of the facts in the case, and you must determine what the facts in the case are. It is not my purpose to express any opinion I may have of a single fact in the case, and if I should do so you should disregard it. It is the purpose of the law that jurors shall determine the facts in trials of this character. From your finding upon the fact there is no appeal—your conclusion is final. You will therefore be impressed with the responsibility that rests upon you, and it will occasion you to move in the manner impressed with this responsibility in coming to a conclusion. And in determining the weight of the evidence you necessarily must consider the feelings which you ought to give to the testimony of the several witnesses.

You are, therefore, the sole judges of the credibil-



ity of the witnesses who have testified before you, and you will, in determining the credit to be attached to the testimony of any witness, take into consideration the demeanor of the witness upon the witness-stand, the opportunities of the witness for knowing the things about which they testified, the reasonableness of the story of the witnesses who testified, the interest or lack of interest in the result of this controversy; in fact, you will consider any matter which has been developed on the trial of the cause by the evidence which has been presented which could in any way emphasize the credit that should be given or could in any way lessen the degree of confidence which should be placed upon that [310] testimony.

And in this connection you are advised if any witness has wilfully testified falsely in your judgment concerning any material fact in the cause you would have a right to disregard that testimony entirely except in so far as it may be corroborated by the other credible evidence that may be developed in the trial of the case.

In your consideration of this case you will take into consideration all of the matters which have been developed upon the trial and determine what the truth in this case really is.

You are instructed that in this case the status of the parties with reference to the benefits to accrue to any of the parties between the contract is the understanding of the parties at the time, the terms of the contract that was entered into, and it is from this basis that their rights must be determined.

By the provisions of this contract the defendant

had a right to reapportion the territory covered by this contract for reasons sufficient under the particular provision. The defendant could not simply move arbitrarily and simply take from the plaintiff the benefit which had already accrued and earned without compensating the plaintiff for such earnings already made and practically terminated. In other words, the defendant could not, under the terms of this contract, cancel the contract after the plaintiff had sold a number of automobiles and had earned moneys by reason of the provisions of the terms of this contract without compensating the plaintiff for the earnings already made. In other words, if you find from the [311] evidence in this case that the plaintiff, the Harmon Motor Car Company, had sold a number of automobiles at the time of the cancellation of this contract, and that the defendant then did cancel the contract by any sort of method adopted, as disclosed by the evidence, that the plaintiff would not be precluded from recovering for the damage which was sustained by the Harmon Motor Car Company by reason of the sales which had been made prior to that time.

You are also instructed that the plaintiff would be entitled to recover for such sales that could have been made during the life of the contract if the cars had been furnished, if you find from the evidence that it was reasonably certain that sales could have been made and profits could have been earned, but such profits from such sales must appear from the testimony to have been reasonably certain and not resting chiefly on speculation, conjecture or surmise. It is

not necessary that this damage, if any, sustained by reason of sales not already made, or, rather, prospective sales, be fixed by the testimony with mathematical accuracy; but it must be established to such a degree of certainty as to lead the jury to a reasonable approximation of what that would be, eliminating the element of speculation, conjecture and surmise entirely from that consideration.

Now, in order to determine whether the Harmon Motor Car Company would have been able to sell cars which it had contracted to buy from the defendant, and which had not been sold by the Harmon Motor Car Company or by the plaintiff at the time of the breach of the contract, you will take into consideration all the evidence which [312] has been presented bearing upon the condition of the market for cars, the ability of the Motor Car Company, or the plaintiff, under the testimony, to meet the public demand, the preparation which had been made for the sale by cultivating the mind, the public mind, by advertising, by the equipment of its place of business, garage, and all of the elements disclosed by the testimony which goes to make up the immediate environment, and surrounding which discloses a relation to the public, and determine from all the evidence what that relation was, and what the evidence shows would have been reasonably certain to have been developed from that condition; and likewise take into consideration the character of the car, the reliability and efficiency of the machine, and all of the matters disclosed by the evidence which, as I have stated a moment ago, would carry you to that



reasonable conclusion of certainty as to what, if any, loss was sustained by reason of such fact.

You are further instructed that the fact that this note attached to this contract provides that if not paid within a given time that the contract shall end, that under the testimony disclosed in this case that provision of the note is waived. When the defendant gave to the Harmon Motor Car Company time in which to pay the note, and carried the note from time to time, and accepted payments upon the note, it thereby waived the arbitrary clause in the contract giving it the power to cancel it *any* any time; and before the defendant could cancel the contract after it had carried it along in the way disclosed by the testimony, and accepted payments as disclosed [313] by the testimony, the Harmon Motor Car Company, or the plaintiff in this case as the successor in interest of the Harmon Motor Car Company, would have been entitled to a reasonable notice and demand for the payment, and afforded an opportunity of meeting the terms before being cut off in an arbitrary way.

You are also instructed that a *part*, on terminating a relation existing between him and another upon a given ground and for a stated reason, may not, after the termination of that relation and suit has been instituted in the court to recover because of a wrongful termination of that relation, change his reason for terminating that relation. In other words, the defendant in this case could not terminate the contract in February for a stated reason and now give another reason upon the trial of the cause for the cancella-



tion of the contract. It is bound by the reason given in the letter at the time the contract was attempted to be cancelled, which is in evidence before you, and any other reason which may appear in the evidence may not be of force.

You are instructed that under the provisions of the contract in suit the defendant was and is excused for delays in delivery due to strikes, floods, or any other causes beyond the control of the manufacturer, or seller, whether occurring in the plant of the manufacturer, or that of any concern from which the manufacturer or seller purchased parts or equipment; and the shipment of the automobiles covered by the contract in suit was made, as specified in the contract, subject to the prior orders of other dealers, and as the business of the manufacturer [314] would permit.

In this case you will determine from the evidence the number of automobiles contracted prior to the contract entered into between the plaintiff, or her assignor, and the defendant on the 18th of October, 1914,—and all this is in evidence—and then determine whether the failure of the defendant to furnish the cars was due to prior orders, and if you find that the prior orders were less than the cars subsequently furnished by the defendant, then, of course, the failure of the factory could not obtain and that would not have force in this litigation.

You are further instructed that upon the cancellation of the contract by the defendant Motor Car Company it was the duty of the plaintiff to minimize her damage insofar as it may be done; that is, by

getting some other car to take the place of the car that she had contracted for with the defendant, so that if she could sell another car to supply the orders which she had received that the damage might be lessened; and if the testimony before you shows that if the plaintiff did make no attempt to secure any other car to take the place of the other car, if you find from the evidence that that would have been useless and it could not have been done—and I think the only testimony in this case is that of the plaintiff herself, who testified before you—why, then that contention of the defendant could not operate in your consideration in this case.

You will give this case careful consideration. You will not permit yourself to be influenced by any sympathy or prejudice in any way, and will not find for [315] the plaintiff because you may think that she was unfortunate in some investments, or against the defendant because you feel that the defendant might be able to pay; but you will pass upon the issues here fairly and frankly, and with a conscientious view of doing justice between these parties, as you would wish done by you, and deliberate upon this in a conscientious, fair and frank manner as you would want persons to deliberate upon a like concern of your own if your positions were reversed, and so that you then would feel as jurors that justice has been done and you have duly deliberated upon your conclusion in this case.

It will require your entire number to agree upon a verdict, and when you have agreed upon a verdict you will cause it to be signed by your foreman, whom

you will elect immediately upon retiring to your jury-room.

If you find for the defendant you will simply sign that verdict. If you find for the plaintiff you will insert the number of dollars that you find for the plaintiff in this case in the blank which is left here, which in no event can be more than the amount stated in the complaint.

The complaint, answer and reply will be sent to the jury-room with you, but they are not to be considered as evidence in the cause. They simply recite the claims of the several parties, and you will conclude that relation to the facts solely from the evidence which has been offered and admitted.

Are there any exceptions you wish?

Mr. IVEY.—Yes, your Honor please, I agreed with Mr. Halverstadt. [316] I would dictate those exceptions after the jury are out.

The COURT.—A certain Court of Appeals have declined to entertain an appeal unless the exceptions are taken in the presence of the jury.

Mr. IVEY.—I should like to take my exceptions at this time, and I am sure Mr. Halverstadt would, too. The defendant excepts to your Honor's failure to give the proposed instruction No. 1; also to proposed instruction No. 2, No. 3, No. 4, No. 5, 6 and 7. I think your Honor gave the instruction No. 8.

The COURT.—In substance, yes.

Mr. IVEY.—And I think your Honor gave some instructions that cover the part of these instructions that I am now taking exception to. It would be very difficult for me to figure out at this time what spe-

cific parts they were, or to tell just exactly to what extent they lapped over, but I would reserve those exceptions. Those exceptions that I took to your Honor's refusal to give these instructions are based upon the fact that, in my opinion, these instructions are applicable to this case.

The COURT.—Yes. Note the exception.

Mr. IVEY.—And the instruction that your Honor gave, being No. 7, we except to for the reason that it is not a correct statement of the law.

The COURT.—I am afraid you will have to recite it. There is no number by which these can be gotten in the record.

Mr. IVEY.—But that was the substance, the plaintiff's purpose, No. 7, your Honor. Your Honor gave the substance of quite a number of instructions prepared, but it was that instruction with reference to—  
[317]

The COURT.—The installments of payments?

Mr. IVEY.—Yes, sir. Then the instruction that was numbered 5 of plaintiff's proposed instructions, in which your Honor instructed the jury that when a party gives a reason for his conduct, and so forth, that he couldn't subsequently change the reason. I except to that one for the reason that it has no application in this case, even conceding that it was the law, and also upon the ground that that does not correctly state the law.

The COURT.—I will state there was some question in my mind whether it did have application for the reason that I struck from the jurors' consideration, I think, most of the testimony that bears upon



this instruction; that is, the testimony which went to the fact of the inability to furnish the cars. An exception may be noted.

Mr. IVEY.—Your Honor please, while I think of it, at this time, in your Honor's stating to the jury what the issues were here, your Honor inadvertently overlooked to state that the answer was amended with reference to those cars that we were unable to deliver.

The COURT.—That was simply on the admission of the evidence, and the evidence has gone in anyhow. I think that would be confusing to the jury.

Mr. IVEY.—I think so myself. We except to the plaintiff's No. 1 on the ground that it is not a correct statement of the law.

The COURT.—I didn't give either of those instructions.

Mr. IVEY.—It is very difficult for me, your Honor, to determine just what parts of those instructions were given by your Honor, because now and then I could see [318] where your Honor was on that subject referred to in that instruction, but then would change it. I withdraw that, then, and note an exception to the one which your Honor gave, which was, in substance, that part of one which your Honor did give in reference to that assignment. I understand that your Honor did not give plaintiff's No. 2. I didn't recall it.

The COURT.—Not as requested. I may have given some of the substance of that. I don't recall.

Mr. IVEY.—Well, I would like an exception to that. I recall now what your Honor did say about

that. I would like an exception to the instruction that your Honor did give with reference to the right of the Harmon Motor Car Company to have the cars delivered to it that it had already sold, notwithstanding the fact that the defendant had a right to cancel the contract. There can be no question as to which one that was. And your Honor gave also the substance of No. 3, the substance of that part thereof which begins with about the middle of line number six, to which we wish to reserve an exception. That is all the exceptions I have this time, your Honor.

The plaintiff took no exceptions.

The defendant's proposed instructions that were duly presented and above referred to as numbered one to seven inclusive are respectively as follows:

DEFENDANT'S PROPOSED INSTRUCTION  
NO. 1.

You are instructed that the defendant company had a right under the terms of the contract in question to cancel and rescind the contract that it had with the Harmon [319] Motor Car Company, if the defendant F. E. Harmon conducted the business of the company in such manner as to bring the Reo machine into disrepute and if you find from the evidence in this case that the said conduct was such as to bring about this disrepute, then your verdict must be for the defendant.

DEFENDANT'S PROPOSED INSTRUCTION  
NO. 2.

You are instructed further that if you find that the Harmon Motor Car Company at any time between the first of October, 1914, and the 22d day of

February, 1915, through F. E. Harmon, the husband of plaintiff in this case, was neglecting the business of selling Reo machines and that the said F. E. Harmon was conducting himself and the business of said agency so as to bring the Reo car into disrepute in the city of Seattle and the territory covered by said contract, the defendant had a right to cancel and rescind said contract, and your verdict must be for the defendant.

DEFENDANT'S PROPOSED INSTRUCTION  
NO. 3.

You are instructed further that the contract in question is one of a personal nature and that the same could not be assigned by the Harmon Motor Car Company without the consent and approval of the Northwest Motor Car Company and that any attempted assignment on the part of the Harmon Motor Car Company without this consent is void and of no effect.

DEFENDANT'S PROPOSED INSTRUCTION  
NO. 4.

You are further instructed that if the said Harmon Motor Car Company, up to the time that said contract was [320] cancelled by the defendant company, was not properly promoting the sale of said Reo car in the territory allotted to it by the contract, the said defendant Company had a right to cancel the said contract, and if you find from the evidence that the Harmon Motor Car Company during this period was not in fact properly promoting the sale of these cars in all or any part of the territory

allotted to it, then your verdict must be for the defendant.

DEFENDANT'S PROPOSED INSTRUCTION  
NO. 5.

You are further instructed that the defendant had a right to cancel said contract for the failure of the Harmon Motor Car Company to pay that certain note described in said contract toward the end thereof, which said note was payable by the terms of said contract within thirty days from and after October 17th, 1914, and if you find that the said Harmon Motor Car Company neither paid the said note within said period of thirty days, nor within such additional time as was given to it by the defendant Company within which to pay the same, that said contract was subject to cancellation at the option of the defendant company, and your verdict must be for the defendant.

DEFENDANT'S PROPOSED INSTRUCTION  
NO. 6.

You are further instructed that if you find that the defendant was not justified in cancelling the contract it had with the Harmon Motor Car Company, you are then to determine what damages, if any, the Harmon Motor Car Company suffered by reason of this cancellation and in determining these damages you must include only such damages as could have been reasonably contemplated by the defendant company when it terminated said contract, and [321] you are instructed that the contract in question provides that the Harmon Motor Car Com-



pany should report at the end of each week to the seller all names and addresses of parties purchasing cars from the Harmon Motor Car Company during that week, together with the factory number of the car or cars sold, and that if any damages were sustained by the reason of such nondelivery of any such cars that were not thus reported prior to the date of cancellation of such contract, that such item of damage shall not be allowed; and in determining the damage that the said Harmon Motor Car Company sustained you will have to consider not the gross profits that would have been made on the sale of the machines that the plaintiff claims were not delivered to this company, but only the net profits that would have been made.

DEFENDANT'S PROPOSED INSTRUCTION  
NO. 7.

You are further instructed that the contract between the defendant and the Harmon Motor Car Company provides, among other things, that it was contingent delays due to strikes and other matters and that the shipment of the automobiles which the defendant was to furnish to the said Harmon Motor Car Company was subject to the prior orders of other dealers and was to be made as the business of the manufacturer would permit; and if you find that the plaintiff was entitled to damages against the defendant, you are to use as a basis of the number of machines that should have been furnished that number which you find could have been furnished by the defendant under said contract, having due regard

for the said provisions, and you are instructed that the said defendant by said contract [322] did not agree to cause the manufacturer to do anything in particular, but it agreed to furnish the Harmon Motor Car Company the number of machines referred to in said contract subject to the conditions, among others, just mentioned.

The plaintiff's proposed instructions numbered two, three, five and seven, above referred to, are respectively as follows:

## II.

You are instructed that even though you may find that the defendant rightfully cancelled the contract between it and the Harmon Motor Car Company, it could not refuse to deliver the automobiles which had theretofore been sold by the Harmon Motor Car Company, if you find that any such automobiles were so sold by it, and you are further instructed that the defendant at the time of such cancellation would owe to the plaintiff the commissions fixed by the contract for the automobiles which had been sold by the Harmon Motor Car Company prior to such cancellation.

## III.

The profits which the plaintiff would have made in selling the cars which the defendant had agreed to sell, but which had not been sold by the plaintiff or the Harmon Motor Car Company at the time the defendant breached the contract, if you find that the defendant did breach the contract, are what is known in law as "prospective profits." The loss of such profits may be recovered when it appears to have been within the contemplation of the parties as a

probable result of the breach of the contract, to be its natural, primary and probable [323] consequence, and to be susceptible of proof by evidence reasonably certain, and not resting chiefly on speculation, conjecture or surmise. It is not necessary that the damages in order to be recoverable shall be calculable with mathematical accuracy. There may be elements which can be determined only by approximation, and which may be in some degree contingent or matter of opinion; and yet the damages as a whole may be measured by standard as definite as that by which in the nature of things juries must be guided in reaching results in many instances.

#### V.

When a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his grounds, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by settled principles of law.

#### VII.

I charge you, as a matter of law, that if you find the Northwest Auto Company permitted the Harmon Motor Car Company to pay the note mentioned in the contract, a copy of which is attached to the complaint in this case, in installments, and granted it indulgences as to matter of time in the way of payment of that note, it waived payment thereof according to its terms, and could not thereafter declare the contract forfeited without having first

notified the Harmon Motor Car Company of its intention so to do and have given it a reasonable time to pay the note.

And you are further instructed that if no forfeiture [324] of the contract was declared for non-payment of the note prior to the payment thereof, the Northwest Auto Company could not thereafter forfeit the contract because the note was not paid at the time it became due.

**JURY RETIRES TO CONSIDER THEIR VERDICT.**

Thereafter a motion for a new trial was duly filed upon the grounds, among other things, that the verdict was excessive and that the evidence was not sufficient to justify the same and that there occurred errors at the time of trial, which errors were specifically set out in the motion, and the same came on for hearing and was denied and exception allowed, and thereafter a judgment in the following form was entered:

*“United States District Court, Western District of  
Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Judgment.**

This cause came on for trial before the court and a jury on the 21st day of June, 1917, the plaintiff



appearing in person and by Piles & Halverstadt, and Miller & Lysons, her attorneys, the defendant appearing by its officers and by Kerr & McCord, and J. M. Ivey, its [325] attorneys, and testimony in evidence on behalf of the parties having been offered and received by the Court, and said cause having been submitted to the jury under instructions of the Court, and said jury having returned a verdict in favor of the plaintiff in the sum of \$13,727.10, and the plaintiff having duly remitted from said verdict the sum of \$983.95, and the Court being fully advised in the premises,—

IT IS ORDERED, ADJUDGED AND DECREED, that the plaintiff G. M. Harmon, do have and recover from the Northwest Auto Company, a corporation, defendant above named, the sum of \$12,743.15, together with her costs and disbursements herein taxed at the sum of \$——, with interest thereon at the rate of 6% per annum until paid, to which the defendant excepts and exceptions allowed.

Done in open court this —— day of August, 1917.

JEREMIAH NETERER,

Judge.”

To the entering of which judgment the defendant excepted and exception was allowed. [326]

Thereupon, in furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions, and prays that the same may be settled, allowed, signed and certified by the Judge who tried the cause as provided by law.

KERR & McCORD,

Attorneys for Defendant.

[Indorsed]: Filed in the U. S. District Court, Western District of Washington, Northern Division. Sep. 28, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [327]

---

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Petition for Writ of Error.**

To the Honorable JEREMIAH NETERER, Judge of  
the District Court aforesaid:

Now comes the Northwest Auto Company, defend-  
ant in the above-entitled cause by attorney, and re-  
spectfully shows that on the 26th day of June, 1917,  
a jury, duly impaneled, found a verdict against your  
petitioner, the Northwest Auto Company.

Your petitioner feeling itself aggrieved at said  
verdict and judgment rendered thereon as aforesaid,  
herewith petitions the Court for an order allowing it  
to prosecute a writ of error to the United States  
Circuit Court of Appeals, for the Ninth Circuit, un-  
der the laws of the United States in such cases made  
and provided.

Wherefore, premises considered, your petitioner

prays that a writ of error do issue with an appeal in this behalf to the United States Circuit Court of Appeals, aforesaid, sitting at San Francisco, State of California, in said Circuit for the correction of the error complained of, and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by the plaintiff in error conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of the said Writ of Error [328] by the Circuit Court of Appeals for the Ninth Circuit.

KERR & McCORD,

Attorneys for Petitioner in Error.

Copy of within petition for writ of error received and due service of same acknowledged this 10th day of Oct., 1917.

PILES & HALVERSTADT,

Attorneys for Plaintiff.

[Indorsed]: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 10, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [329]

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY,

Defendant.

**Assignment of Errors.**

Comes now the defendant Northwest Auto Company, a corporation, and files the following assignment of errors upon which it will rely on the prosecution of its writ of error in the above-entitled cause:

I.

The Court erred in permitting the witness Thornton to answer the following question:

Q. Mr. Thornton, if deliveries had been made of cars as specified in this contract, Plaintiff's Exhibit 3, as follows: October, 2; November, 1; December, 4; January, 8; February, 20; March, 20; April, 20; May, 15; and June, 10; if, I say, deliveries of cars had been made according to that schedule, how many cars could the Harmon Motor Car Company have disposed of before the expiration of this contract on the 31st day of July, 1915?

The defendant objected to this question upon the ground that it called for a conclusion and the objec-



tion was overruled and defendant took exception.  
[330]

## II.

The Court erred in refusing to sustain defendant's objection to permitting the witness F. E. Harmon to answer the following question:

Q. Mr. Harmon, what, if anything, in addition to what you testified yesterday \* \* \* what condition, if any, in addition to what you suggested yesterday afternoon created a demand and a special demand for autos in the city of Seattle in the year, later part of the year, 1914 and 15?

The defendant objected to this question being answered upon the ground of its being immaterial, and the objection being overruled exceptions were taken.

## III.

The Court erred in overruling the said witness' answer to the question set out in assignment six, which answer was as follows:

A. Well along with the other things I named yesterday, one thing in particular was the coming of jitney busses; that is the thing that brought out several hundred, a good hundred sales in the city of Seattle *along*, and the Reo car was a practical car for that because of its feature of being cheap in operation and such things as that and there were a good many Reos and such cars as that sold.

The defendant moved to strike this answer out

upon the ground that it was immaterial and the motion was denied and exception taken.

IV.

The Court erred in refusing to grant the defendant's motion for nonsuit. To which ruling the defendant took exception and exception was allowed.  
[331]

V.

The Court erred in refusing to permit the witness Vogler to answer the following question, when he was being examined as to what was the outcome of his going to a certain bank to make inquiries as to the financial standing of the Harmon Motor Car Company:

Q. What was the result?

To this ruling defendant duly objected and excepted.

VI.

The Court erred in refusing to permit the witness Albert Burke to answer the following question:

Q. Well, what representations, if any, were made to you with reference to this being a new car?

The answer to this question would have been that the Harmon Motor Car Company had sold to this witness a second-hand car representing that it was a new car. Objection to the answer having been sustained, the defendant excepted.

VII.

The Court erred in striking the answer to the following question propounded to the witness Burke:

Q. Why would you not have kept your contract with them?

The plaintiff moved to strike this question because she contended that the contract did not provide for cancellation on such a contingency, the answer having been:

A. Because the business relations weren't pleasant.

To this ruling defendant excepted.

VIII.

The Court erred in refusing to permit the witness Burke to answer the following question:

Q. Well, what were the facts that caused you to cancel [332] this contract in addition to not having furnished you the cars?

IX.

The Court erred in refusing to permit the witness Burke to continue his answer to the following question:

Q. Now, if I may, go on and state any further instances \* \* \* .

Mr. HALVERSTADT.—We object to a general discourse to this answer.

The COURT.—Yes, I must sustain the objection, because we are not trying out the issues between the Harmon Motor Car Company and this witness; that's a new issue entirely; that is not before the Court.

Mr. IVEY.—I would like to except, your Honor.

The COURT.—Noted.

It being the contention of the defendant that this evidence was material.

## X.

The Court erred in granting plaintiff's motion to strike out the testimony of the witness Clark as to the conditions existing which prevented the defendant from getting sufficient cars to fill its contracts, which said testimony is set out at page — of defendant's proposed bill of exceptions; such testimony having been claimed by plaintiff to be self-serving and hearsay evidence. To this ruling the defendant excepted and exception allowed.

## XI.

The Court erred in refusing to permit the defendant to prove that the contract that was had by said witness Burke and the Harmon Motor Car Company was cancelled by the said witness for a good and sufficient reason, which ruling this defendant excepted.  
[333]

## XII.

The Court erred in refusing to give defendant's proposed instruction No. 1 as follows:

You are instructed that the defendant Company had a right under the terms of the contract in question to cancel and rescind the contract that it had with the Harmon Motor Car Company, if the defendant F. E. Harmon conducted the business of the Company in such manner as to bring the Reo machine into disrepute and if you find from the evidence in this case that the said conduct was such as to bring about this disrepute then your verdict must be for the defendant.



To which defendant duly excepted and exception allowed.

XIII.

The Court erred in refusing to give defendant's proposed instruction No. 2, as follows:

You are instructed further that if you find that the Harmon Motor Car Company at any time between the first of October, 1914, and the 22d day of February, 1915, through F. E. Harmon, the husband of plaintiff in this case, was neglecting the business of selling Reo machines and that the said F. E. Harmon was conducting himself and the business of said agency so as to bring the Reo car into disrepute in the City of Seattle and the territory covered by said contract, the defendant had a right to cancel and rescind said contract, and your verdict must be for the defendant.

To which defendant duly excepted and exception was allowed.

XIV.

The Court erred in refusing to give defendant's proposed instruction No. 3 as follows:

You are instructed further that the contract in question is one of a personal nature and that the same could not be assigned by the Harmon Motor Car Company without the consent and approval of the Northwest Auto Company and that any attempted assignment on the part of the Harmon Motor Car Company without this consent is void and of no effect.

To which defendant duly excepted and exception was allowed.

### XV.

The Court erred in refusing to give defendant's proposed Instruction No. 4, as follows: [334]

You are further instructed that if the said Harmon Motor Car Company, up to the time that said contract was cancelled by the defendant Company, was not properly promoting the sale of said Reo cars in the territory allotted to it by the contract, the said defendant Company had a right to cancel the said contract, and if you find from the evidence that the Harmon Motor Car Company during this period was not in fact properly promoting the sale of these cars in all or any part of the territory allotted to it, then your verdict must be for the defendant.

To which defendant duly excepted and exception allowed.

### XVI.

The Court erred in refusing to give defendant's proposed instruction No. 5, as follows:

You are further instructed that the defendant had a right to cancel said contract for the failure of the Harmon Motor Car Company to pay that certain note described in said contract toward the end thereof, which said note was payable by the terms of said contract within thirty days from and after October 17th, 1914, and if you find that the said Harmon Motor Car Company neither paid the said note within the said period of thirty days, nor within such addi-

tional time as was given to it by the defendant Company within which to pay the same, that said contract was subject to cancellation at the option of the defendant company, and your verdict must be for the defendant.

To which defendant duly excepted and exception was allowed.

## XVII.

The Court erred in refusing to give defendant's proposed instruction No. 6, as follows:

You are further instructed that if you find that the defendant was not justified in cancelling the contract it had with the Harmon Motor Car Company, you are then to determine what damages, if any, the Harmon Motor Car Company suffered by reason of this cancellation and in determining these damages you must include only such damages as could have been reasonably contemplated by the defendant company when it terminated said contract, and you are instructed that the contract in question provides that the Harmon Motor Car Company should report at the end of each week to the seller all names and addresses of parties purchasing cars from the Harmon Motor Car Company during that week, together with the factory number of the car or cars sold, and that if any damages were sustained by the reason of such nondelivery of any such cars that were not thus reported prior to the date of cancellation of such contract, that such item of damages shall not be allowed; and in determining the damage that

the said Harmon Motor Car Company sustained you will [335] have to consider not the gross profits that would have been made on the sale of machines that the plaintiff claims were not delivered to this company, but only the net profits that would have been made.

To which the defendant duly excepted and exception was allowed.

### XVIII.

The Court erred in refusing to give defendant's proposed instruction No. 7, as follows:

You are further instructed that the contract between the defendant and the Harmon Motor Car Company provided, among other things, that it was contingent upon delays due to strikes and other matters and that the shipment of the automobiles which the defendant was to furnish to the said Motor Car Company was subject to the prior orders of other dealers and was to be made as the business of the manufacturer would permit, and if you find that the plaintiff was entitled to damages against the defendant, you are to use as a basis of the number of machines that should have been furnished, that number which you find could have been furnished by the defendant under said contract, having due regard for the said provisions, and you are instructed that the said defendant by said contract did not agree to cause the manufacturer to do anything in particular, but it agreed to furnish the Harmon Motor Car Company the number of machines referred to in said



contract subject to the conditions, among others, just mentioned.

To which the defendant duly excepted and exception was allowed.

### XVIII.

The Court erred when it gave the following instruction:

The defendant could not simply move arbitrarily and simply take from the plaintiff the benefit which had already accrued and earned without compensating the plaintiff for such earning already made and practically terminated. In other words, the defendant could not under the terms of this contract cancel the contract after the plaintiff had sold a number of automobiles and had earned the money by reason of the provisions of the terms of this contract, without compensating the plaintiff for the earnings already made, etc.

To which the defendant duly excepted and exception was allowed. [336]

### XIX.

The Court erred when it gave the following instruction:

You are also instructed that the plaintiff would be entitled to recover for such sales as could have been made during the life of the contract, if the cars had been furnished, *it* you find from the evidence that it was reasonably certain that the sales could have been made and the profits could have been earned, but such profits

from such sales must appear from the testimony to have been reasonably certain, etc.

To which the defendant duly excepted and exception was allowed.

## XX.

The Court erred when it gave the following instruction:

You are further instructed that the fact that this note attached to this contract provides that if the note was not paid within a given time that the contract should end, that under the testimony disclosed in this case, that provision of the note is waived \* \* \* and the Harmon Motor Car Company or the plaintiff in this case as the successor in interest of the Harmon Motor Car Company would have been entitled to reasonable notice and demand for the payment and afforded an opportunity of meeting the terms before being cut off in an arbitrary way.

To which the defendant duly excepted and exception was allowed.

## XXI.

The Court erred in instructing the jury as follows:

You are instructed on terminating a relation existing between one party and another upon a given ground and for a stated reason, one may after the termination of that relation and suit has been instituted in the court to recover because of a wrongful termination of that relation, change his reason for terminating that relation. In other words, the defendant

in this case could not terminate the contract in February for a stated reason, and now give another reason upon the trial of the cause for the cancellation of the contract. It is bound by the reason given in the letter at the time the contract was attempted to be cancelled, which is in evidence, because of any other reason, which may appear in the evidence may not be enforced.

To the giving of this instruction the defendant excepted and exception was allowed.

### XXII.

The Court erred in not granting the defendant a new trial, to which defendant duly excepted and exception was allowed. [337]

### XXIII.

The Court erred in making and entering the decree made and entered herein on or about the 1st day of September, 1917, because the verdict upon which the said decree was based was against the law, contrary thereto and excessive in amount, and because the jury, in arriving at their verdict, did not follow the instructions of the Court. The defendant excepted to the entering of this decree and the exception was allowed.

WHEREFORE, the said defendant, plaintiff in error, prays that the judgment in said trial court be reversed and that the said District Court of the United States for the Western District of Washington, Northern Division, be directed to grant a new trial in said cause.

KERR & McCORD,  
Attorneys for Defendant.

Due and timely service of the foregoing assignment of errors is hereby accepted on this 10th day of October, 1917.

PILES & HALVERSTADT,  
Attorneys for Plaintiff.

[Endorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 10, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [338]

---

*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Order Allowing Writ of Error and Fixing Amount of  
Bond.**

The defendant having this day filed its petition for a Writ of Error from the Judgment entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, together with an Assignment of Errors, all in due time, and praying that an order be made fixing the amount of security which defendant shall furnish on said Writ of Error, and that upon the giving of such security, all proceedings in this court be stayed pending the determination of said Writ of Error, it is hereby



ORDERED that a Writ of Error is hereby allowed to have judgment reviewed in the *United Circuit* Court of Appeals for the Ninth Circuit and it is further

ORDERED that upon the defendant, Northwest Auto Company, a corporation, filing with the clerk of this court a good and sufficient bond in the sum of \$16,000.00 to the effect that if the said defendant, Northwest Auto Company, a corporation, shall prosecute the said Writ of Error to effect, and answer all damages and costs, if it fails to make its plea good, then the said obligation to be void, otherwise to remain in full force and virtue. Said bond to be approved by the Court and all further proceedings in this court be and are hereby suspended and stayed until the determination of the said Writ of Error by the Honorable United States Circuit Court of Appeals for the Ninth Judicial Circuit. [339]

Dated at Seattle, Washington, this the 10th day of October, 1917.

JEREMIAH NETERER,

Judge.

Service of the foregoing order allowing writ of error and fixing amount of supersedeas bond is hereby accepted this the 10th day of October, 1917.

PILES & HALVERSTADT,

Attorneys for Plaintiff.

[Indorsed]: Order Allowing Writ of Error and Fixing Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 10, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [340]

*In the District Court of the United States for the  
Western District of Washington, Northern Divi-  
sion.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS,  
That the Northwest Auto Company, a corporation,  
as principal, and Massachusetts Bonding and Insur-  
ance Company, a corporation, authorized to do a  
surety business in the State of Washington, Surety,  
are held and firmly bound unto G. M. Harmon, plain-  
tiff above named, in the sum of sixteen thousand and  
no/100 dollars, to be paid to said G. M. Harmon, her  
executors, administrators and assigns, for which pay-  
ment well and truly to be made we bind ourselves and  
each of us jointly and severally, and our and each  
of our heirs, executors, administrators, successors or  
assigns, firmly by these presents.

Sealed with our seals and dated this the 10th day  
of October, 1917.

WHEREAS, the defendant above named has sued  
out a writ of error to the United States Circuit Court  
of Appeals for the Ninth Circuit to reverse the judg-  
ment entered in the above-entitled court in favor of  
plaintiff and against the defendant in the sum of

twelve thousand seven hundred forty-three and 15/100 (\$12,743.15) dollars, and costs to be taxed at \$——.

NOW, THEREFORE, the condition of the above obligation is such that the above-named defendant shall prosecute said writ of error to effect and shall answer and pay all costs if it shall fail to make good its plea, then the above obligation [341] shall be void; otherwise it shall be and remain in full force, virtue and effect.

WITNESS our seals and names hereto affixed the day and year first above written.

NORTHWEST AUTO COMPANY.

By KERR & McCORD,

Its Attorneys.

MASSACHUSETTS BONDING AND INSURANCE CO.

[Seal]

By FRANK E. SMITH,

Attorney in Fact.

COUNTERSIGNED at Vancouver, Washington,

By J. R. McGILL,

Resident Agent.

The above and foregoing bond, and the sufficiency of the surety thereon, is hereby approved by me this 10th day of October, 1917.

JEREMIAH NETERER,

Judge of the District Court of the United States for the Western District of Washington.

Copy of within bond received and due service of same acknowledged this 10th day of Oct., 1917.

PILES & HALVERSTADT,

Attorneys for Pltff.

[Indorsed]: Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 10, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [342]

---

*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff and Defendant in Error,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant and Plaintiff in Error.

**Order Directing Transmission of Original Exhibits  
to Appellate Court.**

This matter coming on for hearing on this the 6th day of November, 1917, upon motion of Kerr & McCord, attorneys for defendant and plaintiff in error, and it appearing to the Court that the parties hereto have agreed that it is impracticable to transcribe the exhibits on file herein, and the Court finding that it is impracticable to do so, it is ordered that Plaintiff's Exhibits 1 to 12, inclusive, and 15, and Defendant's Exhibits "A," "B," "C" and "D," the same being all of the exhibits on file herein, may be by the clerk of this court transmitted to the Circuit Court of Appeals for the Ninth Circuit, there to be inspected and considered, together with the transcript of record on appeal in this cause.



Done in open court this 6th day of November, 1917.

JEREMIAH NETERER,

Judge.

Due, legal and timely service of a copy of the foregoing Order is hereby acknowledged, and the consent of plaintiff and defendant in error to the entering of said order is hereby given.

PILES & HALVERSTADT,

Attorneys for Plaintiff and Defendant in Error.

[Indorsed]: Order to Transmit Exhibits. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 6, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [342A]

---

*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Order Extending Time for Transmission of Original  
Exhibits to Appellate Court.**

This matter coming on for hearing, and it appearing to the Court that the parties hereto have stipulated that the transcript of record in the above-entitled cause may be forwarded at this time to the Circuit Court of Appeals for the Ninth Circuit, without the exhibits and that the exhibits may thereafter

and within twenty days from date hereof be forwarded to the said clerk of the Circuit Court of Appeals, and it appearing that there is good cause for the extension hereinafter given, it is now by the Court;

ORDERED, that the time within which the exhibits on file herein may be forwarded to the Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby extended up to and including the 26th day of November, 1917.

IT IS FURTHER ORDERED, That the time within which the balance of the record may be forwarded to the said Circuit Court of Appeals be, and the same is hereby extended up to and including the 12th day of November, 1917.

Done in open court this 6th day of November, 1917.

JEREMIAH NETERER,

Judge.

O. K.—PILES & HALVERSTADT,

Attorneys for Plaintiff.

[Indorsed]: Order. Filed in the U. S. District Court, Western District of Washington, Northern Division. November 6, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [342B]

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Stipulation Re Printing of Transcript of Record.**

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the following-described documents on file herein, together with the exhibit transmitted separately, shall constitute the record on appeal, and that in preparing a transcript of said record the clerk of the above-entitled court need not include any other documents, except the following:

Complaint.

Summons.

Petition for Removal.

Bond on Removal.

Notice in Re Order to Remove Cause to District Court.

Affidavit of D. V. Halverstadt in Opposition to Removal.

Notice of Appearance Attorneys for Plaintiff.

Minutes in Re Plaintiff's Objections to Order Removal Overruled.

Order of Removal.

Order to Transmit Original Exhibits.

Answer.

Amended Reply.

Verdict.

Motion for Order Extending Time to File Bill of Exceptions.

Order Extending Time to File Bill of Exceptions.

Stipulation in Re Hearing Motion for Order Extending Time to File Bill of Exceptions.

Motion for Judgment *Non Obstante* and in the Alternative for a New Trial.

Receipt in Re Motion for Judgment *Non Obstante*, etc.

Decision of Court Denying Motion for New Trial.

Remission from Verdict.

Order Denying Motion for Judgment *Non Obstante Veredicto* for New Trial.

Judgment.

Order to Incorporate in Proposed Bill of Exceptions Proposed Amendments of Plaintiff.

Stipulation in Re Proposed Bill of Exceptions.

Order Settling and Certifying Bill of Exceptions.

Bill of Exceptions.

Petition for Writ of Error.

Assignment of Errors.

Order Allowing Writ of Error and Fixing Amount of Bond.

Bond.

Writ of Error.

Citation in Error. [343]



Dated at Seattle, Washington, this 25th day of October, 1917.

PILES & HALVERSTADT,  
Attorneys for Plaintiff.  
KERR & McCORD,  
Attorneys for Defendant.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward type-written transcript to the Circuit Court of Appeals for printing, as provided under Rule 105 of this court.

KERR & McCORD,  
J. N. IVEY,  
Attorneys for Plaintiff in Error.

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western District of Washington, Northern Division. Oct. 25, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [344]

---

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Certificate of Clerk U. S. District Court to Transcript  
of Record.**

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, clerk of the United States District Court, for the Western District of Washington, do hereby certify that the foregoing 344 typewritten pages, numbered from 1 to 344, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause on writ of error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [345]

Clerk's fee (Sec. R. S. U. S.), for making record, certificate or return, 813 folios at 15c.....	\$121.95
Certificate of Clerk to transcript of record, 4 folios at 15c.....	.60
Seal to said Certificate.....	.20
Certificate of Clerk to original exhibits, 3 folios at 15c.....	.45
Seal to said Certificate.....	.20
<hr/>	
Total.....	\$123.40

I hereby certify that the above cost for preparing and certifying record amounting to \$123.40 has been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 6th day of November, 1917.

[Seal]

FRANK L. CROSBY,  
Clerk U. S. District Court. [346]

*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Writ of Error.**

The President of the United States to the Honorable,  
the Judge of the District Court for the West-  
ern District of Washington, Northern Division,  
GREETING:

Because in the record and proceedings and also in  
the rendition of the judgment upon a plea which is in  
the said court before you, or some of you, between  
G. M. Harmon, the plaintiff and the defendant in er-  
ror, and Northwest Auto Company, a corporation,  
defendant and plaintiff in error, manifest error hath  
happened, to the great prejudice of the said North-  
west Auto Company, a corporation, defendant and  
plaintiff in error, as by its complaint and assignment  
of errors appears;

We, being willing that error, if any there be,  
should be duly corrected and full and speedy justice  
done to the parties aforesaid, in this behalf do com-  
mand you, if judgment be therein given, that then,  
under your seal, distinctly and openly, you send the  
record and proceedings aforesaid, with all things



concerning the same, to the United States Circuit [347] Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, State of California, on the 8th day of November next, and within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this the 10th day of October, 1917.

[Seal]

FRANK L. CROSBY,

Clerk.

By Ed M. Lakin,

Deputy.

Clerk of the United States District Court for the Western District of Washington, Northern Division.

United States of America,

Western District of Washington,—ss.

We hereby acknowledge receipt of a true and correct copy of the foregoing Writ of Error and acknowledge service of said Writ of Error by the receipt of a copy thereof.

Oct. 10, 1917.

G. M. HARMON,

By PILES & HALVERSTADT,

Attorneys for Plaintiff. [348]

[Endorsed]: No. 3310. In the District Court of the United States for the Western District of Washington, Northern Division. G. M. Harmon, Plaintiff, vs. Northwest Auto Company, a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 10, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [349]

---

*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Citation in Error.**

The President of the United States to G. M. Harmon  
and Messrs. Pyles & Halverstadt, Her Attor-  
neys:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco within thirty days from the date of this writ, pursuant to a Writ of Error filed in the office of the clerk of the United States District Court of the Western District of Washington, Northern Division, sitting at Seattle, wherein you are the plaintiff and defendant in error, to show cause, if any

there be, why the judgment in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this the 10th day of October, in the year of our Lord, 1917.

JEREMIAH NETERER,  
Judge. [350]

Attest my hand and the seal of the United States District Court for the Western District of Washington, Northern Division, at the clerk's office at Seattle, Washington, the day and year last above written.

[Seal]

FRANK L. CROSBY,  
Clerk.  
By Ed. M. Lakin,  
Deputy.

Service of the foregoing Citation in Error acknowledged the 10 day of October, 1917.

PILES & HALVERSTADT,  
Attorneys for Plaintiff. [351]

[Endorsed]: No. 3310. In the District Court of the United States for the Western District of Washington, Northern Division. G. M. Harmon, Plaintiff, vs. Northwest Auto Company, a Corporation, Defendant. Citation in Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 10, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [352]

[Endorsed]: No. 3075. United States Circuit Court of Appeals for the Ninth Circuit. Northwest Auto Company, a Corporation, Plaintiff in Error, vs. G. M. Harmon, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed November 9, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

---

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. 3075.

NORTHWEST AUTO COMPANY, a Corporation,  
Plaintiff in Error,  
vs.

G. M. HARMON,

Defendant in Error.

**Stipulation Excluding Original Exhibits from  
Printed Transcript of Record.**

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, that the printed record in the above-entitled cause need not include the exhibits, and that the said exhibits may be used in evidence to the same effect as though the same were printed in said record.



Dated this 13th day of November, 1917.

KERR & McCORD,  
Attorneys for Plaintiff in Error.  
PILES & HALVERSTADT,  
MILLER & LYSONS,  
Attorneys for Defendant in Error.

[Endorsed]: No. 3075. United States Circuit  
Court of Appeals for the Ninth Circuit. Northwest  
Auto Company, a Corporation, vs. G. M. Harmon.  
Stipulation Excluding Original Exhibits from  
Printed Transcript of Record. Filed Nov. 26, 1917.  
F. D. Monckton, Clerk.

*410.*

